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JOHN F. DAV

IN THE

Supreme Court of the United States

October Term, 1965

RECORD NOT PRINTED

No. 584

RECORD NOT P

STATE OF CALIFORNIA,

Petitioner,

vs.

ROY ALLEN STEWART,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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STATE OF CALIFORNIA,

Petitioner,

vs.

ROY ALLEN STEWART,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

The State of California prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of California entered in the above case on March 25, 1965, as modified on April 21, 1965.

Opinions Below.

The opinion and modification of opinion of the Supreme Court of the State of California, printed in Appendix A hereto, are reported in 62 A.C. 597, 62 A.C. 648, and 43 Cal. Rptr. 201.

Jurisdiction.

The Supreme Court of the State of California first entered judgment in this case on March 25, 1965. A timely petition for rehearing was filed and denied on April 21, 1965, at which time the opinion was modified. (*People v. Stewart*, 62 A.C. [Minutes], No. 25, p. 1.)

Petitioner invokes the jurisdiction of this court under 28 U.S.C., §1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

Questions Presented.

1. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States solely because the investigating officers did not advise him of his right to consult with counsel and his right to remain silent?

2. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a State criminal trial by reason of the Constitution of the United States because the prosecution did not establish that the defendant at the time of the questioning made a knowing and intelligent waiver of both (a) his right to consult with counsel and (b) his right to remain silent?

3. If so, is such a free and voluntary confession inadmissible where the record does not affirmatively establish that the defendant was not advised of his rights and did not waive them?

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, respondent was charged with two counts of kidnapping to commit robbery, five counts of robbery, one count of rape, and one count of murder. [Clk. Tr. pp. 1-9.][1] In a jury trial, he was found

[1]Clk. Tr. refers to the Clerk's Transcript and Rep. Tr. refers to the Reporter's Transcript. Certified copies of these proceedings in the State court accompany this petition.

guilty of four counts of first degree robbery and one count of first degree murder and was acquitted on the other counts. [Clk. Tr. pp. 27-28.] At the conclusion of a separate trial on the question of penalty, the jury determined that respondent should suffer death and he was sentenced to death. [Clk. Tr. pp. 40-42.] Upon his automatic appeal to the California Supreme Court, the judgment was reversed. *People v. Stewart*, 62 A.C. 597, 62 A.C. 648, 43 Cal. Rptr. 201.

Statement of Facts.

The essential facts may be summarized as follows:

Respondent was found guilty of murdering Miss Lucille Mitchell and robbing Mrs. Meriwether Wells, Mrs. Tsuru Miyauchi, Mrs. Beatrice Dixon and Miss Maria Ramirez. Each woman was struck down while walking along the street [Rep. Tr. pp. 365-384, 505-511, 525-532, 551-555, 560-567, 604-609.] Miss Mitchell was kicked to death and the other women were injured with varying degrees of severity. [Rep. Tr. pp. 376-384, 528-532, 557-558, 585-588, 631-632, 649-657, 663-664, 666-668, 671.]

There was evidence that respondent endorsed the name of Mr. Wells to three dividend checks which had been stolen from Mrs. Wells [Rep. Tr. pp. 419-423, 462-468, 470-471, 475-487.] After learning respondent's identity, the investigating officers went to his house, where he was arrested for robbery on the evening of January 31, 1963. [Rep. Tr. pp. 690-693, 696-698.] A charga-plate belonging to Miss Mitchell had previously been found near the body of Miss Ramirez. [Rep. Tr. pp. 687-688.] In a search of respondent's house immediately after his arrest, the of-

ficers found a purse and wallet belonging to Mrs. Wells, a coin purse belonging to Mrs. Miyauchi, a watch belonging to Miss Mitchell, a wallet and purse belonging to Miss Ramirez, and a coin purse belonging to Mrs. Dixon. [Rep. Tr. pp. 699-705.] In a later search which took place on February 3rd, the officers found a pair of glasses belonging to Miss Ramirez and a cuff link, a case and an ear plug for a transistor radio belonging to Miss Mitchell. [Rep. Tr. pp. 705-708.]

Respondent was questioned briefly on January 31st, February 1st, February 3rd, February 4th and February 5th. According to the investigating officers, he participated freely and voluntarily in the conversations. [Rep. Tr. pp. 710-712.]

On January 31st and February 1st, respondent denied endorsing and cashing the Wells dividend checks. [Rep. Tr. pp. 712-713, 716-720.] Then, on February 3rd, and after talking to his girlfriend, Lillian Lara, he admitted endorsing and cashing them but said that he found them on the street. [Rep. Tr. pp. 720-722.] Shown on February 4th the items recovered from his house, respondent denied having seen them but he also claimed that Mrs. Wells' purse was one he brought with him when he moved in. [Rep. Tr. pp. 722-725.] In a later conversation on the 4th, he said that someone had brought Miss Ramirez' pursue to his house, he claimed to have found Mrs. Miyauchi's coin purse on the street and, as to Miss Mitchell's watch, he said first that someone brought it to his house and then that he bought it on the street as a present for Lillian Lara. [Rep. Tr. pp. 725-726.] On February 5th, respondent admitted robbing Miss Mitchell, then admitted killing her, stating that he could have kicked her in the head after she fell.

He persisted in denying his guilt of the other robberies. [Rep. Tr. pp. 735-739, 743-745, 788-790.]

As previously mentioned, the investigating officers testified that respondent's statements were entirely voluntary. Respondent testified, among other things, that he admitted his guilt of the Mitchell murder because the officers told him that unless he did so, they would not release Lillian Lara, who was pregnant and had also been arrested for robbery. [Rep. Tr. pp. 823-824, 855-857, 872-873.] This the officers denied. [Rep. Tr. pp. 746, 751-753, 766-767, 783, 940-941, 964-966]. There was no evidence that respondent asked to see an attorney and the record does not show whether he was or was not advised of his right to counsel and his right to remain silent.

How the Federal Question Arose.

This case is yet another grandchild of *Escobedo v. Illinois,* 378 U.S. 478 and yet another child of *People v. Dorado,* 62 A.C. 350, 42 Cal. Rptr. 169, cert. den. .... U.S. ..... In *Dorado,* the Supreme Court of California felt constrained by *Escobedo* to hold as a matter of federal constitutional law, that once the "accusatory" stage of a police investigation is reached, the police must advise a suspect who has not requested and been denied counsel of his right to consult with counsel and to remain silent, and that if he does not waive those rights, his free and voluntary confession may not be used against him at his trial. In the instant case, the California Supreme Court felt itself constrained by *Escobedo* and *Dorado* to hold, as a matter of federal constitutional law, that unless it appears affirmatively from the record that the police gave the requisite

caution and that the suspect gave the requisite waiver, it will be presumed that there was no warning and no waiver. The issues were briefed and argued before the California Supreme Court and petitioner challenged the correctness of the decision in a timely petition for rehearing.

Reasons Why a Writ of Certiorari Should Be Granted.

1. The Decision Below Rests Upon a Misinterpretation of Escobedo v. Illinois, 378 U.S. 478.

The Supreme Court held, relying on *Dorado,* that respondent was deprived of a federal right when his free and voluntary confessions were received in evidence against him. The question, therefore, is not whether it is good practice for the police to caution suspects during interrogation, nor is it whether a State court may fashion a state rule of evidence requiring the police to give legal advice. The question is, rather, whether the Constitution of the United States compels the police to caution suspects or to suffer the exclusion of free and voluntary confessions, which are reliable evidence of guilt.

It is unnecessary for petitioner to quote to this Court the substance of its own ruling in *Escobedo,* which holds merely that the State must honor a suspect's request to see his attorney during interrogation. It is a far cry from that careful and very limited decision to a ruling that the police must arraign suspects before questioning them with the same formalities required in judicial proceedings. *Cf., Carnley v. Cochran,* 369 U.S. 606.

This Court denied certiorari in *Dorado*, but it likewise denied certiorari in an Illinois case which specifically rejected the *Dorado* rule. In addition, *Dorado* is contrary to a number of federal cases, as well as to decisions in Massachusetts, New York, Pennsylvania, Wisconsin, North Carolina, Virginia, Maryland, Idaho, Nebraska and Nevada.[2] Certiorari should be granted here, if only to secure uniformity of interpretation upon a constitutional question of the first importance to the administration of justice in every State.

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[2] *People v. Hartgraves*, 202 N.E. 2d 33 (Ill. 1964), cert. den.;
People v. Lewis, 207 N.E. 2d 65, 66 (Ill. 1965);
People v. Golson, 207 N.E. 2d 782 (Pa. 1964);
Comm. v. Coyle, 203 A. 2d 782 (Pa. 1964);
Comm. v. Patrick, 206 A. 2d 295, 299 (Pa. 1965);
Browne v. State, 131 N.W. 2d 169 (Wis. 1964);
State v. Upchurch, 141 S.E. 2d 528, 531 (No. Car. 1965);
State v. Elam, 263 N.C. 273, 139 S.E. 2d 601, 607 (No. Car. 1965);
State v. McLeod, 203 N.E. 2d 349 (Ohio 1964);
Cowans v. State, 209 A. 2d 552 (Md. 1965);
Anderson v. State, 205 A. 2d 281 (Md. 1964);
State v. Hall, 397 P. 2d 261, 264-265 (Idaho 1964);
State v. Worley, 132 N.W. 2d 764 (Neb. 1965);
Morford v. State, 395 P. 2d 861 (Nev. 1964);
Bean v. State, 398 P. 2d 251, 253-255 (Nev. 1965);
State v. Fox, 131 N.W. 2d 684 (Iowa 1964);
People v. Gunner, 15 N.Y. 2d 226, 205 N.E. 2d 852 (N.Y. 1965);
Comm. v. Roy, 207 N.E. 2d 284, 288 (Mass. 1965).

Intermediate appellate courts further support our position.
People v. Agar, 253 N.Y.S. 2d 761 (1964);
Davis v. State, 388 S.W. 2d 940, 941 (C.C.A. Tex. 1965);
People v. Scanlon, 84 N.J.S. Ct. 427, 202 A. 2d 448 (1964);
Cf. State v. Neely, 398 P. 2d 482 (Ore. 1965);
State v. Dufour, 206 A. 2d 82 (R. I. 1965);
State v. Mendes, 210 A. 2d 50, 52-54 (R. I. 1965);
Galarza Cruz v. Delgado, 233 F. Supp. 944, 948 (D. Puerto Rico 1964);

See too,
State v. Winsett, 205 A. 2d 510, 525 (Del. Super. Ct. 1964);

2. Even if the Court Below Was Correct in Its Interpretation of Escobedo, It Was an Unwarranted Extension of That Decision to Place Upon the Prosecution the Burden of Proving Waiver.

As stated by the Supreme Court, the evidence did not affirmatively show that the police advised respondent of his rights and that respondent waived them. But it did not show that the police did not advise respondent of his rights and that respondent did not waive them. In reversing the judment, the Supreme Court decided that the People were under an affirmative obligation to establish waiver and held that when the record is silent, waiver will not be presumed.

Petitioner submits that this further holding is unsound and is not compelled by the Constitution of the United States. It is common knowledge that suspects, particularly those with prior convictions, are well aware of their rights.[3] The instant holding that a silent record militates against the People is based upon the contrary assumption that they do not know their rights. Petitioner submits that even if the *Dorado* rule is constitutionally sound, a defendant should bear the burden of establishing that he did not know his rights and did not waive them if he seeks to exclude his own free and voluntary confession from the evidence.

Ward v. Comm., 205 Va. 564, 138 S.E. 2d 293 (Va. 1964);
Biddle v. Comm., 141 S.E. 2d 710, 713;
State v. Longmore, 134 N.W. 2d 66 (Neb. 1965);
United States v. Ogilvie, 334 F. 2d 837, 843 (7th Cir. 1964);
Long v. United States, 338 F. 2d 549, 550 (D.C. Cir. 1964);
Jackson v. United States, 337 F. 2d 136 (D.C. Cir. 1964);
United States v. Childress, 347 F. 2d 448, 450 (7th Cir. 1965).

[3]Respondent admitted having suffered two prior felony convictions. [Clk. Tr. pp. 10, 14.]

Conclusion.

For the reasons discussed above, petitioner submits that a writ of certiorari should issue to review the decision of the court below.

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APPENDIX "A".

Opinion of the Supreme Court.

In the Supreme Court of the State of California, in Bank.

The People, Plaintiff and Respondent, v. Roy Allen Stewart, Defendant and Appellant.

Filed: March 25, 1964.

William I. Sullivan, Clerk.
By .....
S.F. Deputy
Crim. 7662

The jury found defendant guilty of robbery and murder of the first degree and fixed the penalty at death. The trial court denied his motion for a new trial and for a reduction of the penalty. This appeal is automatic (Pen. Code, § 1239, subd. (b)).

Defendant contends that his confession was improperly admitted at the trial because he was not informed of his right to counsel and of his right to remain silent prior to the time he confessed and because he gave his confession involuntarily. He also contends that during the penalty trial the trial judge gave an instruction condemned in People v. Morse (1964) 60 Cal.2d 631.

Since we conclude that the admission of defendant's confession constituted reversible error in view of our recent holding in People v. Dorado (1965) 62 A.C. 350, we need not reach the issues raised by defendant's other contentions.

During December 1962 and January 1963 a series of robberies accompanied by beatings took place in a neigh-

borhood of Los Angeles. On December 21, 1962, an assailant struck Mrs. Meriwether Wells while she was walking down the street and took from her a handbag containing $5 to $10, a wallet bearing her maiden name, charge-a-plates in the names of Mr. and Mrs. Robert K. Wells, a salary check payable to Mrs. Wells, a salary check payable to Mr. Wells, and three dividend checks. Mrs. Wells, who suffered a fractured jaw, said that the culprit was a "colored man," but she was unable to identify him.

On January 10, 1963, someone robbed Mrs. Tsuru Miyauchi of her leather lunch bag, containing a red change purse with her daughter's name on it, pictures, keys, and $8 to $10 in cash. As she was walking down the street, the assailant hit her on the head with a blunt instrument, causing her to suffer a fractured skull and a broken nose. She could not identify the robber.

On January 19, 1963, Miss Lucile O. Mitchell was beaten and robbed of a silver cufflink, a transistor earplug, a black leather case for such an earplug, a watch, and a charge-a-plate. Miss Mitchell, who was found on a house porch, subsequently, without have identified the attacker, died from a head wound.

On January 25, 1963, Mrs. Beatrice Dixon, while walking down a street, was hit on the head and robbed of her large leather bag containing a billfold, $23, a black coin purse, cash, and a door key on a chain bearing her initial, "B." Mrs. Dixon could not identity the person who hit and robbed her.

When, on January 30, 1963, Miss Maria Louisa Ramirez was walking down a street, someone hit her

on the side of her head. When she regained consciousness, her purse containing a wallet, coin purse, and a pair of glasses in a case were gone. The police officer investigating the robbery found the charge-a-plate taken from Miss Mitchell on the ground about 18 inches from the place where Miss Ramirez had been lying. A witness to the crime testified at the trial that defendant looked like the assailant, but she did not make a positive identification.

Mr. Wells, husband of the first of the above victims, reported to the police that the dividend checks stolen from his wife bore the endorsement, "Robert K. Wells." He said that he had never endorsed the checks. The police then interviewed a Mr. Sam Newman, who operated the market where the checks had been cashed. Mr. Newman related that because the person who cashed the checks lacked identification, a Mrs. Lena Franklin, who was then in the store and was apparently acquainted with the defendant, cosigned them. On January 31, Mrs. Franklin pointed out to a police officer the defendant as the one who cashed the checks.

The police officer went to defendant's residence and there informed him that he was under arrest for a series of "purse snatch robberies." When the officer asked if he could search the house, the defendant replied, "Go ahead." During the search, the officer found Mrs. Wells' purse and wallet, Mrs. Miyauchi's coin purse attached to a key that operated the door to defendant's house, Miss Mitchell's watch. Mrs. Dixon's coin purse and initialed key, and Miss Ramirez' wallet. On February 3, during a further search of the house the police found Miss Ramirez' glasses and Miss Mitchell's cufflink, transistor earplug and case.

Likewise on January 31, the police arrested four other people who were in the house at the time of defendant's arrest. The police later determined that besides defendant the only other people who actually lived in the house were a woman referred to as Lillian Lara[1] and her daughter. The police interrogated all five persons.

The police officers testified at the trial that during the interrogations of the defendant on January 31, and on February 1 he denied any knowledge of the checks, even though confronted by Mrs. Franklin, the cosigner of the checks. A tape of the January 31 interrogation was introduced at the trial for impeachment purposes. According to one of the officers, on February 3 defendant said that if he could see Lillian Lara he might have "something to say." After a meeting with her, defendant admitted signing Wells' name to the checks and cashing them, but he claimed that he found the checks; he also denied having seen any of Mrs. Wells' other belongings prior to the date of the interrogation.

On February 4 the police showed defendants the objects found in his residence, but, according to the police officers, he denied having seen them before. One of the officers testified that defendant then said that he had brought the purse, subsequently identified as belonging to Mrs. Wells, to his house when he had moved there two months earlier. He also told the police that other people had brought some of the other stolen objects into the house. A police officer testified that

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[1]Some question arose as to whether defendant and Lillian Lara were married. During the January 31 interrogation, which was recorded, defendant referred to a "Lillian Davis" as a "girl friend" at whose house he spent two or three nights a week. Defendant testified that he and Lillian Lara had been married in Mexico.

defendant denied having seen Miss Ramirez' wallet; but the defendant said he found Mrs. Miyauchi's coin purse on the street. Another officer testified that when the defendant was shown Miss Mitchell's watch he at first denied having previously seen it, but then said someone brought it to his house. He later said he had bought the watch on the street and had given it to Lillian Lara.[2]

On February 5 defendant admitted that he robbed Miss Mitchell. An officer testified that defendant expressed sorrow at having killed Miss Mitchell and said, "I didn't mean to kill her." The police then recorded an interrogation during which defendant again admitted robbing Miss Mitchell. He denied hitting Miss Mitchell on the head; he did say, however, that he could have kicked her in the head after she fell and while he was escaping. He continued to insist that he had not participated in the other robberies.

The police brought defendant before a magistrate for the first time shortly after his confession. They then released the other persons arrested in connection with the crimes. An officer testified that an investigation of these people revealed "no evidence to connect them with any crime."

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[2]At the trial defendant denied having said at any time that he had never seen the dividend checks or that he had found the checks. He asserted that a Jackie Jackson gave him the checks to cash. He also denied having said that he never saw Miss Mitchell's watch or having said that he had purchased it. He testified that Jackie Jackson and a Louis Bookman brought the stolen goods to his house. Jackie Jackson also testified that Louis Bookman brought the stolen goods to the house. Linda Lara, Lillian Lara's daughter, testified that Bookman and Jackie Jackson were in the house and that Jackie Jackson used Miss Mitchell's charge-a-plate.

The transcriptions of the January 31 interrogation and of the February 5 confession of the robbery and other incriminating statements were admitted into evidence without objection, although during the trial defendant contended that he gave his confession involuntarily.[3] Nothing in the record indicates whether or not defendant was informed prior to his confession of his rights to counsel and to remain silent or whether he otherwise knowingly and intelligently waived those rights.[4]

Following the decision of the United States Supreme Court in Escobedo v. Illinois (1964), 378 U.S. 478, we held in People v. Dorado (1965), 62 A.C. 350, 365, "that defendant's confession could not properly be introduced into evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights."

The instant case presents the following principal questions: (1) whether, at the time defendant uttered

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[3]Although the record does not indicate that the trial judge made an independent determination of whether the confession was voluntary, we do not probe the problem raised by *Jackson v. Denno* (1964), 378 U.S. 368, since we reverse on other grounds.

[4]The Attorney General admits that there is nothing "specifically showing whether appellant was or was not advised of his 'right to counsel and right to remain silent at the interrogation.'" In a number of instances, the police officers conducting the interrogations were asked to relate everything that was said during specific interrogations. They at no time indicated that they had advised defendant of his rights to counsel and to remain silent.

the confession, the investigation had reached the accusatory or critical stage so that he was entitled to counsel, and hence to be advised of his rights to counsel and to remain silent if he did not otherwise waive those rights; (2) whether the lack of any indication in the record that defendant was advised of his rights to counsel and to remain silent precludes a finding that he was so advised. We set forth our reasons for answering each of these questions in the affirmative.

The United States Supreme Court in *Escobedo* fixed the point at which a suspect is entitled to counsel is that at which "the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession. . . ." (378 U.S. at p. 492.) The court also characterized the time when a person needs the "guiding hand of counsel" as that when the "investigation had ceased to be a general investigation of 'an unsolved crime' "; at that time the defendant "had become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so." (*Id.* at pp. 485, 486.)

Normally "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" (Id. at p. 490) at that point when the police officers placed that suspect under arrest. But *Escobedo* indicates that the accusatory or critical state is not reached unless another event occurs: the police must "carry out a process of interrogations that lends itself to eliciting incriminating statements." (*Id.* at pp. 490-491; see also *Id.* at pp. 485, 492.) That process may be undertaken either before or after arrest. Whenever the two conditions are met, that is, when

the officers have arrested the suspect and the officers have undertaken a process of interrogations that lends itself to eliciting incriminating statements, the accusatory or critical stage has been reached and the suspect is entitled to counsel.

We believe that the arrest encompasses two of the circumstances which produced the accusatory stages in the *Escobedo* and *Dorado* cases: (1) the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, and (2) the suspect is in custody.

An arrest fulfills the first requirement that the investigation has begun to focus on a particular suspect. The Penal Code itself conditions the arrest upon the presence of reasonable ground for the belief that the individual committed the offense; section 813 predicates the issuance of a warrant upon "reasonable ground to believe that the defendant has committed" the offense; section 836 requires that the arrest must rest upon the officer's reasonable cause for believing the person committed the offense.

"Probable cause for an arrest," we have said, "is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. . . . Probable cause may exist even though there may be some room for doubt. . . . The test in such case is not whether the evidence upon which the officer made the arrest is sufficient to convict but only whether the prisoner should stand trial." (People v. Fischer (1957) 49 Cal.2d 442, 446; see generally, Witkin, Cal. Crim. Proc. (1963) pp. 102-104: Fricke, Cal. Criminal Procedure (6th ed. 1962) pp. 19-20.)

The arrest includes "custody," the second condition present in *Escobedo* and *Dorado*. By definition in this state, an element of an arrest is custody. Thus, section 834 of the Penal Code states "An arrest is taking a person into custody. . . ."

Since, once a person has been properly placed under arrest, probable cause must support it, we conclude that the investigation has at least "*begun* to focus on a particular suspect." (378 U.S. at p. 490; emphasis added.) Indeed, as the court said in a case which, although based upon the McNabb-Mallory rule, cites *Escobedo*, "Ordinarily, arrest is the culmination, not the beginning, of police investigation." (Greenwell v. United States (1964) 336 F.2d 962, 966.)

We turn to the further requirement of *Escobedo* that, beyond the "focus" and custody, the accusatory stage matures upon the undertaking by the police of a "process of interrogations that lends itself to eliciting incriminating statements." (378 U.S. at p. 491; see *id.* at pp. 485, 492; United States v. Konigsberg (3rd Cir. 1964) 336 F. 2d 844, 853.)[5] Although in most cases the process of interrogations following an arrest will so lend itself, it does not necessarily do so.

In the *Konigsberg* case, supra, Federal Bureau of Investigation agents apprehended the defendants in a garage containing stolen goods, arrested them and took them to the bureau's office. At that office, prior to an

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[5]We do not agree with the suggestion of some writers that, for purposes of *Escobedo*, the accusatory or critical stage begins with the arrest alone. See Anderson, *Representation of Defendants, Panel Discussion* (1965), 33 F.R.D. 129, 141; Enker and Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois* (1964), 49 Minn. L.Rev. 47, 70-73; Note, *The Supreme Court, 1963 Term* (1964), 78 Harv.L.Rev. 143, 220.

arraignment, the agents asked Konigsberg " 'why he was in this garage and just what had taken place . . . and . . . if he wished to cleanse himself or explain . . . what his reasons for being there were, why the other individuals were there.' " (*Id.* at p. 852.) Konigsberg then made some incriminating statements. Among other reasons for not applying *Escobedo,* the court said that the purpose of the interrogation, even though it took place after the arrest, was not to elicit a confession. The court stated, "The uncontradicted purpose of the discussion was to give Konigsberg a chance to explain his presence in the garage if he could; to hear Konigsberg's side of the story. . . . If Konigsberg or any of the other people caught in the garage could account for their presence this was their opportunity." (*Id.* at p. 853; see People v. Ghimenti (1965) 232 A.C.A. 111, 119.)

The test which we have described does not propose a determination of the actual intent or subjective purpose of the police in undertaking the interrogations but a determination based upon the objective evidence. Whatever may be the subjective intent of the interrogators, we must, in order to determine if the police are carrying out "a process of interrogations that lends itself to eliciting incriminating statements" (Escobedo v. Illinois, *supra,* at p. 491), analyze the total situation which envelopes the questioning by considering such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances.

As some writers have suggested, "An objective test is . . . likely for the new American rule, for it is noteworthy that the question of 'purpose to elicit a confession' may be more readily determined from the objec-

tive evidence—such as the nature of the questions and accusations put to defendant and the length of the interrogation—than the question whether the police had decided to charge the defendant." (Enker and Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois* (1964) 49 Minn. L.Rev. 47, 71.)

In the instant case all of the above conditions had been fulfilled. Defendant was not only under arrest at the time he confessed but had been in custody for five days and had been interrogated daily. In his summation, the prosecutor referred to the interrogation of the defendant on January 31 concerning the robbery of Mrs. Wells as an "accusatory circumstance." A police officer testified that on February 5 he entered the interrogation room and said to the defendant, "Roy, you killed that old woman. . . ." Such extensive interrogations during the period of defendant's incarceration could serve no other purpose than to elicit incriminating statements. Thus, prior to his confession, the defendant was entitled to counsel under the *Escobedo* case, for the "accusatory" stage had been reached.

We do not think the contrary contention of the Attorney General that defendant's confession was procured at the investigatory stage can prevail in the light of the above facts. The Attorney General argues that the fact that the Mitchell watch had not been found among defendant's possessions but in a bureau drawer containing the possessions of Lillian Lara, as well as the fact of the continued custody of four other suspects of the crime, establishes that the police were still conducting a "general inquiry" and had not "begun to focus" on the defendant at the time of the confession. As we have explained above, the arrest of defendant demon-

strates that the police believed that they had reasonable ground for attributing to him the commission of the crimes. The continued custody of other suspects does not automatically negate the advent of the accusatory stage as to defendant; the above conduct of the police destroys that contention.

Concluding, therefore, that prior to his confession defendant was entitled to counsel under *Escobedo,* we probe the second major premise of the Attorney General that, despite the absence of a showing of advice to defendant of his rights to counsel and to remain silent, we can presume that such warning was given. The Attorney General bases his contention upon People v. Farrara (1956), 46 Cal. 2d 265, which, in the absence of evidence to the contrary, expressed a presumption that the officers in that case lawfully performed their duties.

Farrara, we believe, can readily be distinguished from the instant case. There, appellants contended that the police obtained certain of the adduced evidence during an illegal search and seizure. Since the trial occurred prior to our decision in People v. Cahan (1955), 44 Cal.2d 434, declaring such evidence inadmissible, the record was barren of any showing as to the legality of the search. This court said, "It is settled . . . that error will not be presumed on appeal, . . . and in the absence of evidence to the contrary it must also be presumed that the officers regularly and lawfully performed their duties. (Code Civ. Proc., § 1963 subds. (1), (15), (33). . . ." (46 Cal.2d at p. 268.)

Whereas, long before *Cahan,* searches and seizures illegal under federal law had been illegal in California (Cal.Const., art. I, § 19), no such antecedent illegality

had been present in the *Escobedo* situation. Indeed, *Cahan* merely provided a remedy in the form of exclusion for evidence illegally seized. Until *Escobedo* and *Dorado,* however, the law of this state did not give an accused a right to counsel during prearraignment interrogations and therefore did not require that an accused be advised of his rights to counsel and to remain silent if he had not otherwise waived those rights.[6] We cannot presume that the police acted in accordance with an unannounced constitutional principle. We therefore cannot presume in the face of a silent record that the police informed defendant of his right to remain silent and of his right to counsel. (See Carnley v. Cochran (1962) 369 U.S. 506.)

In Carnley v. Cochran (1962) 369 U.S. 506, the United States Supreme Court said, "The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." (*Id.* at p. 516.) It follows that in order to establish a waiver of the right to the assistance of counsel the record must indicate that the defendant was advised of his right to counsel and to remain silent or that he knew of these rights and intelligently and knowingly waived them.

To presume in the instant case that absent the warnings defendant knew of his right to counsel at the prearraignment stage prior to the time that the United States Supreme Court established this right in

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[6]Section 825 of the Penal Code, guaranteeing a person arrested the right to see an attorney, does not signify that counsel must be allowed to be present during interrogations. (People v. Garner (1961), 57 Cal.2d, 165 (Traynor, J., concurring).)

Escobedo would be to ascribe to him an utterly fictitious clairvoyance.

We have said that the use of a confession obtained in violation of the defendant's constitutional right to counsel compels a reversal. (People v. Dorado (1965) 62 A.C. 350, 368-369.)

The judgment is reversed.

Tobriner, *J.*

We concur:

Traynor, *C. J.*
Peters, *J.*
Peek, *J.*

People v. Stewart, Crim. 7662.

Concurring Opinion of Burke, J.
to
Opinion of Tobriner, J.

The majority bases its reversal upon the admission into evidence of a voluntary confession in violation of the defendant's constitutional right to counsel, based upon this court's decision in *People v. Dorado,* 62 A.C. 350. As noted in my dissent in *Dorado,* concurred in by Mr. Justice Schauer, assuming that there was error in the admission of such voluntary confession the mandate of section 4½ of article VI of the California Constitution requires this court to review the entire record to determine the probability that a result more favorable to the defendant would have been reached had the error not been committed (*People v. Watson* (1956) 46 Cal. 2d 818, 836) and that therefore there was a miscarriage of justice. The majority opinion in the case at hand does not indicate that there was a review of "the entire cause, including the evidence" and that the majority is of "the opinion that the error complained of has resulted in a miscarriage of justice." (Const., art. VI, §4½.)

Under the mandate of article VI, section 4½, and of the supplemental rule of this court as to the test to be applied in determining whether such an error in the admission of evidence compels reversal (*People v. Watson, supra* (1956) 46 Cal.2d 818, 836), I have reviewed

the entire cause, including the evidence, and have concluded that it is reasonably probable that a result more favorable to the defendant would have been reached if the subject evidence had not been erroneously admitted against him. Under these circumstances the error compels reversal and I, therefore, concur in the reversal of the judgment of conviction.

Burke, *J.*

PEOPLE v. STEWART, Crim. 7662.

Dissenting Opinion of Schauer, J.
to
Opinion of Tobriner, J.

I concur generally in the law as stated by Mr. Justice Burke in his concurring opinion, but after review of the entire cause, including the evidence, am not affirmatively persuaded that a result more favorable to the defendant would have been reached in the absence of the declared error.

The encompassing net of interwoven circumstances established by the prosecution is to me inherently more convincing than the direct uncorroborated statement of any single witness could ordinarily be. The confession here is significant principally because it is consistent with the only conclusion reasonably supported by the proof independently made. Assuming that such additional—in effect, cumulative—proof was erroneously received does not persuade me to the conclusion that in the absence of the error a result more favorable to the defendant would have been probable.

I would affirm the judgment in its entirety.

*Schauer, *J.*

I Concur:
McComb, *J.*

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*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX "B".

Modification of Opinion.

In the Supreme Court of the State of California in Bank.

The People, Plaintiff and Respondent, v. Roy Allen Stewart, Defendant and Appellant. Crim. 7662.

Filed April 21, 1965.

By the Court:

Strike the paragraph at the top of the ditto copy page 17 beginning "We have said" and insert in lieu thereof the following: "Since we have said that the use of a confession obtained in violation of the defendant's constitutional right to counsel compels a reversal, we must reverse the judgment on the counts involving the robbery and murder of Miss Mitchell. (People v. Dorado (1965) 62 A.C. 350, 368-369.)

"Because defendant, however, confessed only to the robbery and murder of Miss Mitchell, we must determine if the erroneous admission of his confession constituted prejudicial error as to those other robberies for which he was convicted but as to which he did not confess. (See People v. Dorado, *supra,* 62 A.C. 350, 368.) A full examination of the record indicates that the error requires the reversal of the judgment on these counts since 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (People v. Watson (1956) 46 Cal.2d 818, 837.)

"Thus the evidence adduced at the trial indicated that the same person participated in all of the charged robberies. All of the robberies took place in the same neighborhood; they were all committed in the same fashion; the police found at defendant's residence items stolen during each of the robberies. Because of the inter-relationship among these crimes, defendant's confession to the robbery and murder of Miss Mitchell composed strong evidence of his guilt on each of the robberies to which he did not confess."

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IN THE

Supreme Court of the United States

October Term, 1965
No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ROY ALLEN STEWART,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

PETITIONER'S OPENING BRIEF.

Opinion Below.

The opinion of the Supreme Court of California is reported at 62 Cal. 2d 571 and 400 P. 2d 97.

Jurisdiction.

The California Supreme Court filed its decision on March 25, 1965. (*People v. Stewart,* 62 A.C. 597.) A timely petition for rehearing was denied on April 21st; on the same day the decision was modified. (*People v. Stewart,* 62 A.C. [Minutes], No. 25, p. 1; *People v. Stewart,* 62 A.C. 648.) Pursuant to the 22nd rule of this Court, our time to file a petition for writ

of certiorari was extended by Mr. Justice Goldberg until August 19th, then by Mr. Justice Douglas until September 18th. The case was docketed on September 18th and certiorari was granted on December 6th. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions and Statutes Involved.

This case involves the Sixth Amendment to the United States Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution. Those provisions are reprinted in Appendix A, *infra*.

Questions Presented.

1. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a state criminal trial by reason of the Constitution of the United States solely because the investigating officers did not advise him of his right to consult with counsel and his right to remain silent?

2. Is a free and voluntary confession by a defendant, who has neither requested nor been refused counsel, inadmissible in a state criminal trial by reason of the Constitution of the United States because the prosecution did not establish that the defendant at the time of the questioning made a knowing and intelligent waiver of both (a) his right to consult with counsel and (b) his right to remain silent?

3. If so, is such a free and voluntary confession inadmissible where the record does not affirmatively establish that the defendant was not advised of his rights and did not waive them?

Statement of the Case.

In an information filed by the District Attorney of Los Angeles County, Stewart was charged with two counts of kidnaping to commit robbery (Miss Champaine, Mrs. Wells), five counts of robbery (Miss Champaine, Mrs. Wells, Mrs. Miyauchi, Mrs. Dixon, Miss Ramirez), one count of rape (Miss Champaine) and one count of murder (Miss Mitchell). [Clk. Tr. pp. 1-9.] It was also alleged that Stewart had suffered prior convictions of robbery and possessing narcotics. [Clk. Tr. p. 10.]

Stewart pleaded not guilty and denied, then admitted the priors. [Clk. Tr. pp. 11, 14.] In a jury trial, he was found guilty of murdering Miss Mitchell and guilty of robbing Mrs. Wells, Mrs. Miyauchi, Mrs. Dixon and Miss Ramirez, the jury finding both the murder and the robberies to be of the first degree. He was found not guilty of kidnaping Mrs. Wells and not guilty of raping, robbing and kidnaping Miss Champaine. [Clk. Tr. pp. 27-28.]

California law provides for bifurcated trials in capital cases. (Cal. Penal Code, Sec. 190.1) At the conclusion of a separate penalty trial, the same jury decided that Stewart should suffer death, and following denial of a new trial motion he was sentenced to death on the murder count and to state prison on the robbery counts. [Clk. Tr. pp. 40-42.] Upon his automatic appeal to the California Supreme Court (See Cal. Penal Code, Sec. 1239b) the judgment was reversed both as to the murder count and as to the four counts of robbery. (*People v. Stewart*, 62 Cal. 2d 571, 400 P. 2d 97.) On December 10, 1965, our application for a stay

of execution was granted pending final determination of this proceeding. (*People v. Stewart,* 63 A.C. [Minutes], No. 22, p. 5.)

The People's Evidence.

Meriwether Wells.

Meriwether Wells lived with her husband at 1942 West 41st Drive in Los Angeles; both were employed by Goodwill Industries. [Rep. Tr. pp. 365-366.] Mrs. Wells left work at 5 p.m. on December 21, 1962, shopped, took a bus, then walked from the bus stop at Gramercy Place and Santa Barbara toward her home, carrying her purse containing $5 to $10 and a black alligator wallet bearing her maiden name, Meriwether Audrey Knapp. Her purse also contained charga-plates from the Broadway Department Store and Bullock's in the names of Mr. and Mrs. Robert K. Wells. [Rep. Tr. pp. 367-373.] It likewise contained two pay checks from the Goodwill Industries, one payable to her and the other to her husband, and three dividend checks which her husband had given her that morning. [Rep. Tr. pp. 374-375.]

As Mrs. Wells was walking south on Gramercy Place, she reached an alley located between 41st Street and 41st Drive. After she traversed the alley and as she stepped up onto the curb, she was struck from behind on the left rear side of the head. Mrs. Wells fell on her back, looked up and saw a colored man who began hitting her on the right side of the jaw. She became unconscious and regained consciousness four

days later at the hospital. Mrs. Wells spent three weeks in the hospital, suffering from a fractured jaw and also from difficulty in hearing.[1] [Rep. Tr. pp. 376-384.] When asked whether Stewart was the man who attacked her, she replied: "I don't know." [Rep. Tr. pp. 394, 397-398.] Mrs. Wells identified her purse, her wallet, one of her charga-plates, two of the dividend checks, and a photostatic copy of the other dividend check. She testified that she did not give anyone permission to take them or to move her into the alley and that she did not see any of the foregoing items for about seven weeks after December 21st. [Rep. Tr. pp. 389-394.]

MacDonald M. Simmons lived at 1906 West 41st Street. At about 6:55 p.m. on December 21st, Simmons heard his dog bark and heard a groaning noise. He went to the front of his house, then to the rear, then obtained a flashlight and shined it into the alley behind his house. Mrs. Wells was in the alley, blood on her face and head; she said "Help" several times and Simmons told his wife to call the police, remaining with her until after they arrived. [Rep. Tr. pp. 408-413.]

Official Marvin L. Cooper came to the scene at about 7 p.m., together with his partner, Officer Phillips. Mrs. Wells was bleeding profusely and unable to speak. [Rep. Tr. pp. 417-418.] Sergeant M. T. McMil-

[1]Mrs. Wells' testimony as to the nature of her injuries was confirmed by Dr. Reid, the examining physician, who testified that she was in critical condition upon being admitted to the hospital. [Rep. Tr. pp. 441-446.]

lan arrived a few minutes later, observing blood smears on the south curb of the alley and drag marks from 8 inches to 2 feet in width extending 38 feet from the smears into the alley to a place where there were more blood smears and some radial marks caused by an object twisting so as to form the arc of a circle. [Rep. Tr. pp. 451-454, 457-459.] McMillan had a conversation with Simmons in which the latter indicated that he found Mrs. Wells at the end of the drag marks. [Rep. Tr. pp. 590-591.] He had a later conversation with her husband in which Mr. Wells mentioned the dividend checks. [Rep. Tr. pp. 455-456.]

The charga-plate identified by Mrs. Wells was found by a teen-aged girl, Nelva Christmas, in some grass near 39th Place and Wilkins [*sic*] shortly after Christmas. Nelva turned it over to the police. [Rep. Tr. pp. 429-431.] The other items identified by Mrs. Wells were traced to Stewart through testimony to be related in part at this point and in part on a subsequent page.

At the time of trial, the dividend checks bore the endorsement of one Lena Franklin, an inked notation "M-51818" and the endorsement "Robert K. Wells." Mr. Wells testified that he did not endorse the checks, that he did not give anyone permission to endorse his name to them, and that the inked notation was not on the checks when he gave them to his wife on December 21st. [Rep. Tr. pp. 419-423.]

Sam Newman operated a market at 3793 South Arlington. Shortly before Christmas, Stewart came to Newman's office and asked him to cash three checks, two of them out-of-state checks. Newman asked Stewart for his driver's license. Stewart said he had none, then Newman told him that someone with a driver's

license would have to co-sign the checks and the latter replied that Lena Franklin, a regular customer of Newman's, was in the store and would do so. [Rep. Tr. pp. 462-465.] Mrs. Franklin showed Newman her driver's license; Newman wrote her license number "M-51818" on the checks; appellant endorsed them, then Mrs. Franklin endorsed them. [Rep. Tr. pp. 466-468.] Stewart signed the name "Robert K. Wells" and wrote the address "1942 West 41st Drive" on the checks. [Rep. Tr. p. 470.] In late January, Newman had a conversation with an officer named Logue about the persons who endorsed and passed the checks. [Rep. Tr. p. 471.]

Lena Franklin had met Stewart on December 13th and was formally introduced to him on December 22nd by her brother-in-law, Herschel Duerson, who told her that his name was Roy Wells.[2] They went to the Duerson's house on Normandie, then to two drug stores and to a market where Stewart said he had some checks he wanted to cash, one of which he succeeded in cashing. [Rep. Tr. pp. 475-479.] Then they went to Newman's Market. There Stewart asked the cashier to cash some checks and was told to see Newman in his office. Summoned by Newman, Mrs. Franklin exhibited her driver's license; Newman wrote her license number on the three Wells dividend checks; Stewart endorsed the checks, then she did; Stewart signed the name "Robert Wells," and when she told him that she thought his name was Roy, he said that he was called "Roy" for short. [Rep. Tr. pp. 480-486.] Then the checks were taken to the cashier and cashed. [Rep. Tr. p. 487.]

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[2]She was also introduced to a woman named Lil, described to her as Stewart's wife. [Rep. Tr. p. 493.]

On January 30th, Mrs. Franklin had a conversation with Officer Logue about the checks and the identity of the man who endorsed and cashed them. That evening[3] she drove around with Logue and some other officers looking for Stewart's house. She recognized a house on 39th Street, saw Stewart standing on the porch, and identified him to the officers as the man who had signed and cashed the checks. [Rep. Tr. pp. 489-491, 502.]

Tsuru Miyauchi.

Mrs. Tsuru Miyauchi lived with her husband and daughter at 3935½ Montclair. Testifying with the aid of an interpreter, she stated that about 6:15 a.m., on January 10, 1963, she started to walk to the bus stop to go to work. She was carrying a leather lunch bag, containing a red change purse, some pictures, some keys and $9 or $10 in cash. [Rep. Tr. pp. 505-508.] When Mrs. Miyauchi reached the intersection of 10th Avenue and 30th Street, she saw someone coming down 30th Street and heard heavy footsteps behind her as she walked down 10th Avenue. She remembered collapsing on the ground. When ~~she awoke an hour~~ later, blood was coming from her ~~head,~~ right eye, nose and mouth; she had lost two teeth; her lunch bag was missing. [Rep. Tr. pp. 508-511.] She returned home and her daughter, who spoke English, called the police. [Rep. Tr. pp. 511-512.] Mrs. Miyauchi identified her purse, testifying that she had not given permission to Stewart or to anyone else to take it. [Rep. Tr. pp. 512-516.] Her condition on the morning of January 10th was confirmed by Officer Vanover, one of the investigating officers, who observed that her eyes were

[3]As will be shown hereinafter, Mrs. Franklin was mistaken about the date.

swollen shut and her hair was matted with blood. [Rep. Tr. p. 520.] She was taken to the hospital, where she remained for 10 days. [Rep. Tr. pp. 517-518.] According to Dr. Charles Carton, the examining physician, she had a broken nose and a depressed fracture of the skull. The skull fracture was caused by a blow from a blunt instrument. [Rep. Tr. pp. 585-588.]

Lucille O. Mitchell.

Mary Louise Mitchell Thomas was the niece of Lucille O. Mitchell, aged 66. Mrs. Thomas last saw her aunt at about 2 p.m., on January 19, 1963; Miss Mitchell was then wearing glasses. Mrs. Thomas identified a pair of glasses, a silver cuff link, a black leather case, an ear plug for a transistor radio, a lady's watch and a Bullock's charga-plate as belonging to her aunt; Miss Mitchell wore the watch on her left wrist. [Rep. Tr. pp. 596-601.]

George Logan lived at 2021 West 35th Place. At about 7 p.m., on January 19th, Logan and his wife drove home, alighted from their car, and heard a groaning noise. On the steps of the porch Logan discovered a Negro lady lying on her back, blood about her head and face, and he summoned the police. [Rep. Tr. pp. 604-609.] Officer R. R. Plante, called to the scene, tried to talk to Miss Mitchell but she was moaning and incoherent. [Rep. Tr. pp. 612-613.] He searched the area and about 100 feet from the Logan residence he found her eyeglasses (which were broken) by a pool of blood on the sidewalk in front of 3560 South Cimarron. In the parkway in front of 1921 West 36th Street Plante also found a receipt bearing Miss Mitchell's name. [Rep. Tr. pp. 615-619.]

Miss Mitchell died in the hospital at 11:45 a.m. on January 20th. [Rep. Tr. p. 620.] An autopsy was per-

formed the following day by T. Noguchi, a coroner's autopsy surgeon. [Rep. Tr. p. 623.] In Noguchi's opinion, Miss Mitchell died of a cortical contusion of the brain and a subdural hematoma with fracture; her death was unnatural. [Rep. Tr. pp. 631-632.] He found five bruises on Miss Mitchell's left arm which could have been caused by fingers gripping. [Rep. Tr. pp. 633, 658.] On the temporal area on the left side of Miss Mitchell's head were five recent crescent-shaped lacerations covering an area measuring about 1½ inches. Noguchi gave his opinion that the lacerations were caused by a hard object with a curved contact surface; the object could have been a shoe. There were seven recent scratches on her right cheek and her right ear had been torn and bruised. [Rep. Tr. pp. 649-656.] There was also a crescent-shaped laceration on the right ear; the laceration was due to blunt force and could have been caused by a shoe. [Rep. Tr. pp. 656-657.] Dr. Noguchi described Miss Mitchell's fracture as a basal skull fracture extending from the right temporal area to the left. [Rep. Tr. pp. 663-664.] In his opinion, her injuries could not have been caused by a single fall. [Rep. Tr. p. 668.] Although there were multiple blows to the head, the ear injury and resulting fracture were fatal. [Rep. Tr. pp. 666-667, 671.]

Beatrice Dixon.

Shortly after 6 p.m. on January 25, 1963, Beatrice Dixon was walking home along Gramercy Place toward 39th Street, carrying a large leather bag containing a billfold, a black coin purse containing $23, and a door key on a chain bearing her initial "B". Mrs. Dixon identified the purse and key at the trial. [Rep. Tr. pp. 525-527.]

As Mrs. Dixon proceeded along Gramercy, she was struck on the left side of the head, then "woke up in the alley with a hole in my head." Her mouth and lips were bleeding and some teeth had apparently been loosened; her purse was also missing, and she had given no one permission to take it. Mrs. Dixon was taken to the hospital, where she remained for one day. [Rep. Tr. pp. 528-532.] She was unaware that Stewart lived about a block away from her house and had never seen him before. [Rep. Tr. p. 532.]

Mrs. Dixon's condition on January 25th was confirmed by Officer Pierre Berleaud, who was summoned to her home and observed her bleeding profusely from the mouth and from a large gash on the left side of her head. [Rep. Tr. pp. 534-535.] Berleaud made a search of the area where Mrs. Dixon said the incident occurred. He discovered a large pool of blood and drag marks leading into an alley at 3881 South Gramercy Place, then found another pool of blood. He found none of her belongings. [Rep. Tr. pp. 536-537.]

Maria Louisa Ramirez.

At approximately 6:40 a.m. on January 30, 1963, Miss Maria Ramirez was walking along Gramercy Place near 38th Place, intending to get her car to go to work. She was carrying her lunch bag and a black patent leather purse containing a wallet with $2 in it and a pair of glasses in a case; these items she identified at the trial. [Rep. Tr. pp. 551-553, 556-557.]

As Miss Ramirez proceeded down the street, she heard footsteps behind her. Then someone hit her on the rear of the right side of the head and she fainted. When she regained consciousness, she was bleeding and

her purse was gone. [Rep. Tr. pp. 553-555.] She was unable to identify Stewart as her assailant but testified that she gave no one permission to take her purse or its contents. She was taken to the hospital where she remained nine days. [Rep. Tr. pp. 557-558.] There she was examined by Dr. Reid, who concluded that her equilibrium had been disturbed by a traumatic injury to the head. [Rep. Tr. pp. 447-450.]

Mrs. Nellie Lattimore lived at 3846½ South Gramercy Place. At approximately 6:40 a.m. on January 30th, Mrs. Lattimore was looking out her second-story bedroom window. She saw a woman walking north on Gramercy Place, carrying a black purse, and a colored man walking behind her at the same rate of speed. [Rep. Tr. pp. 560-563.] Near the corner of 38th Place and Gramercy Place, the man increased his speed. Mrs. Lattimore heard a noise "like some kind of running" and then she saw the man running. Just before she saw him run, her view was blocked by a tree and as he ran, he was carrying a black purse. [Rep. Tr. pp. 563-567.] Mrs. Lattimore ran from her house and discovered Miss Ramirez lying under some bushes, bleeding from the right side of the head; she returned home and called the police. [Rep. Tr. pp. 568-570.] Officer Mark Ford, called to the scene, searched the area and found none of her belongings. [Rep. Tr. pp. 578-580.]

Mrs. Lattimore was asked whether the running man was in court, replied "I think so," and pointed to Stewart. [Rep. Tr. p. 570.] Then she said that she was not sure he was the man. [Rep. Tr. p. 572.] When asked why she thought he was the man, she said that he seemed to be wearing the same clothes and looked like him. [Rep. Tr. pp. 576-577.]

The Arrest, the Searches and the Interrogations.

Sergeant A. H. Logue has already been mentioned as one of the officers in the case. Logue testified that Nelva Christmas showed him where she found Mrs. Wells' charga-plate on December 27th. [Rep. Tr. pp. 681-682.] On the 30th, he had also investigated the Ramirez robbery and he found Miss Mitchell's charga-plate on the ground about 18 inches from the place where Miss Ramirez' body had been lying. [Rep. Tr. pp. 687-688.] He had two conversations with Mr. Wells, one on December 22nd, the other on January 30th. During the latter conversation, Wells gave him photostatic copies of the three dividend checks, Logue showed the photographs to Newman and after talking to Newman he attempted to locate Lena Franklin, whom he succeeded in contacting the following day, January 31st. [Rep. Tr. pp. 683-686.]

Officer Logue drove with Mrs. Franklin and several other officers to locate the home of the man who had cashed the Wells checks. As they approached the premises at 1912 West 39th Street, Logue saw Stewart standing on the front porch; he talked to Lena Franklin, then stopped the car. Logue walked toward the house, Stewart turned and entered it, then Logue and another officer followed him inside, down a hallway and into the entrance of a bedroom, where Logue identified himself and arrested him for robbery. [Rep. Tr. pp. 690-693, 696-698.] The arrest occurred at about 7:15 p.m. Logue told Stewart that he was being arrested for a series of purse-snatch robberies and asked him if he "might look around the house." Respondent said, "Go ahead." [Rep. Tr. p. 698.]

The premises consisted of a single-story duplex containing a living room-dining room combination, a kitchen, a bedroom, a bath, a service porch and a hallway. Mrs. Wells' purse was found on an upper shelf in the bedroom closet along with some men's and women's clothing. Her wallet was found in a bureau drawer in the hallway along with some men's clothing. Mrs. Miyauchi's coin purse, with a key attached, was found in a bureau drawer in the bedroom, together with Miss Mitchell's watch; in the same drawer were women's clothing, jewelry, letters and items of identification in Stewart's name and in the name of Lillian Lara; the key attached to Mrs. Miyauchi's purse opened the front door. [Rep. Tr. pp. 699-703.] Mrs. Dixon's coin purse and initialed key were found in the same bureau drawer as Mrs. Wells' wallet. [Rep. Tr. pp. 703-704.] Miss Ramirez' wallet was discovered in the same bureau drawer and her purse was found under a pile of men's clothing on the back porch. [Rep. Tr. pp. 704-705.] At about 1 p.m. on February 3rd, Officer Logue returned to the premises with Lillian Lara and several other officers. Miss Ramirez' glasses were found in the dining room cupboard and Miss Mitchell's cuff link, case and transistor ear plug were discovered on top of a television set in the living room. [Rep. Tr. pp. 705-708.]

Sergeant Logue testified to a number of conversations with Stewart occurring on January 31st, February 1st, February 3rd, February 4th and February 5th at the University Police Station. Stewart spoke freely and voluntarily. [Rep. Tr. pp. 710-712.]

The first conversation occurred around 10 p.m. on January 31st and lasted about twenty minutes. Ser-

geant Mangiameli, Logue's partner, was also present. The officers had in their possession the items already discovered in Stewart's house. Stewart was shown photographs of the Wells dividend checks and asked if he had ever seen them before; he denied having seen them. He was then asked if he had ever used the name Wells or signed Wells' name to the checks; this he also denied. He was next asked if he knew Lena Franklin and he said he did not. He was asked if he knew where Newman's Market was and he said that he did. When asked whether he had endorsed and cashed the checks at Newman's Market, he said he had not. [Rep. Tr. pp. 712-713, 716-718.]

Two conversations occurred on February 1st, both in the presence of a Sergeant Jensen. The first began around 11 a.m. and lasted about twenty minutes. Stewart was asked the same questions he had been asked the previous night and returned the same answers; however, he voluntarily gave the officers an exemplar of his handwriting. The second conversation occurred at about 3 p.m. and lasted for five or six minutes. The officers told Stewart that his handwriting had been compared with the endorsement on the checks and that in the opinion of the handwriting expert he had signed them, but Stewart again denied having signed Wells' name to the checks. He asked to speak to Lillian Lara and told the officers he might have something to tell them after speaking to her. [Rep. Tr. pp. 718-720.]

The next conversation occurred at about 11 a.m. on February 3rd. It lasted five minutes and Mangiameli was again present. Stewart repeated his request to talk to Lillian Lara and reiterated that after he talked to her he might have something to say. The officers

agreed to let him talk to her and following his conversation with Lillian, they spoke to him again for about five minutes. Stewart admitted having signed Wells' name to the checks and having cashed them. Upon being asked where he had got the checks, Stewart said he had found them at the base of a tree at 37th and Western, but upon being shown Mrs. Wells' purse and wallet, he denied having seen them before. [Rep. Tr. pp. 720-722.]

The following day, February 4th, Logue and Mangiameli had a half-hour conversation with Stewart, beginning just before noon. Stewart was shown Miss Ramirez' purse, glasses and wallet, Mrs. Dixon's purse, Mrs. Miyauchi's coin purse, Miss Mitchell's watch, ear plug and cuff link, and he denied ever having seen any of them. He was again shown Mrs. Wells' purse and wallet and although he denied having seen the wallet, he said that the purse was one he had brought with him when he moved into the duplex about two months previously and had placed on the top shelf of the bedroom closet. He was asked his whereabouts on the evening of January 19th, and replied that he was home all night with his brother. [Rep. Tr. pp. 722-725.]

During a one-hour conversation on the afternoon of February 4th, Stewart was again shown Miss Ramirez' purse. He told Logue and Mangiameli that he had seen it on his back porch and that someone had brought it there. When asked if he had ever seen Miss Mitchell's watch, he said at first that someone had brought it to the house and then he said he bought it on the street as a present for Lillian Lara. He again denied having seen Miss Ramirez' wallet but he said he had found Mrs. Miyauchi's coin purse on the street and had given it to Lillian. [Rep. Tr. pp. 725-726.]

At about 8:30 a.m. on February 5th, Logue and Mangiameli had a twenty-minute conversation with Stewart, most of it recorded on tape. [Rep. Tr. pp. 727-728.] Just before Logue left the room to turn on the recording equipment, Stewart admitted having caused Miss Mitchell's death. [Rep. Tr. pp. 732-733.]

A transcript of the recording was read to the jury. The officers first showed Stewart photographs of the scene at 3560 Cimarron and in response to their questions, he said that he ran up behind Miss Mitchell as she was walking past some birch trees. He snatched a purse which she was carrying on her right arm but did not grab her arm. When asked whether he hit her on the head, he denied having done so, but he said that he could have kicked her in the head after she fell and while he was running although he was not sure. [Rep. Tr. pp. 735-737.] He remembered that she struck the sidewalk as she fell and he said again that he could have kicked her but was sure that he did not hit her. He went home and gave her watch to Lillian later that evening. [Rep. Tr. pp. 737-739.]

When asked what he did with Miss Mitchell's cuff links and ear plug, he said he put them on the television set. [Rep. Tr. p. 739.] He then denied having robbed Mrs. Wells, and when shown Mrs. Miyauchi's coin purse, he said he did not steal it. He also denied having robbed Miss Ramirez and explained that he threw Miss Mitchell's charga-plate away. [Rep. Tr. pp. 739-743.] He denied owning a black jacket, then admitted having intended to snatch Miss Mitchell's purse. He said that he turned the corner and just started walking behind her. As he approached her he began running and took the purse, which was on her right

arm. He could not recall what he did with the purse and when asked again whether he kicked her, he replied that he "may have." [Rep. Tr. pp. 743-745.]

On cross-examination, Logue testified that Lillian Lara was living with Stewart and was arrested at the same time. [Rep. Tr. pp. 747-748, 750.] Logue found on the premises a document purporting to be a proxy marriage certificate but while Stewart was in custody he never used the word "wife" in referring to Lillian; he referred to her by her first name or by both names and he did not tell the officers he was concerned about her because she was pregnant. Logue denied having told him to confess so that his wife could be released, but he admitted that she was in custody until 5 or 6 p.m. on February 5th. [Rep. Tr. pp. 746, 751-753.] He explained that Lillian had been booked for robbery because Miss Mitchell's watch and Mrs. Miyauchi's purse were in her "constructive possession," but he denied telling Stewart that when he explained her possession of those items she could be released. [Rep. Tr. pp. 753-754, 788.]

Amplifying his testimony about the conversations on February 4th, Logue said that when he first told Stewart the dividend checks had been in Mrs. Wells' purse, Stewart said that he brought the purse with him when he moved in and put it in the closet. [Rep. Tr. p. 762.] He denied that Stewart ever told him Lillian Lara had so many purses he did not know one from the other. When asked whether Stewart was anxious to secure her release, Logue said that he seemed to give it little thought. [Rep. Tr. pp. 766-767.] Further amplifying his testimony, Logue said he told Stewart that Lillain had claimed he gave her Mrs. Miyauchi's coin purse,

and Stewart replied that he had never seen it before. Later, after Logue told Stewart the purse had been stolen and showed him Mrs. Miyauchi's name in gold letters on the front of it, Stewart said he had found it on the street. [Rep. Tr. pp. 769-771.] The officer again denied having told Stewart on February 4th that when he learned how Lillian got possession of Mrs. Miyauchi's purse the charge against her would be dismissed, and he also denied having told Stewart that her possession of the purse made it look bad for her. [Rep. Tr. pp. 771-772.]

Sergeant Logue testified further that Mrs. Dixon's purse was found underneath some dirty shirts. When asked on February 4th how the purse came to be in the house, Stewart gave him no explanation, saying merely that people came and went; when asked who they were, Stewart said he could not remember. [Rep. Tr. pp. 775-776.] Logue was asked whether he had ever heard the name Louis Bookman and said he had not. [Rep. Tr. p. 779.] He denied telling Stewart on Febrauary 5th what he was to confess to in return for Lillian's release. [Rep. Tr. p. 783.]

On redirect examination, Sergeant Logue described the conversation preceding the one recorded on tape on February 5th. Logue told Stewart that he had "killed that old woman over on Cimarron Street and you are not even sorry," but Stewart did not reply. Logue repeated his statement and after a few moments Stewart said, "Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her." Stewart then said he had run up behind her and grabbed her purse; she fell down and he kicked her but did not hit her; he went home and gave Lillian the watch. Logue then told Stewart that

he would feel better now that he was telling the truth, left, returned, turned on the tape recorder, then the tape recorded conversation began. [Rep. Tr. pp. 788-790.] Logue denied that Stewart's face was swollen while he was incarcerated at the station. He said that Stewart was in a cell by himself, that no force was used on him, and that he suffered no injury. [Rep. Tr. p. 791.]

The Defense.

Linda M. Lara, aged 14, and the daughter of Lillian Lara, described Stewart as her stepfather. She first met Stewart in November 1962 when they were living at 1912 West 39th Street. According to Linda, a Jackie Jackson, a Slim Evans and a Louis Bookman came to the house on a number of occasions in December and January, although there was never an occasion in January when they were all there together. [Rep. Tr. pp. 792-794.] Linda was shown Miss Mitchell's charga-plate and said that she came home from school one day when Jackie Jackson and Louis Bookman were present and saw it on Lillian's dresser in the bedroom. She returned to the living room, then Jackie went into the bedroom, came back, asked her to look up the Bullock's telephone number, and when Linda asked Jackie which one, Jackie replied "Any one except the one downtown." Linda looked up the number of Bullock's on Wilshire Boulevard, gave Jackie the number, Jackie went back into the bedroom, got the charga-plate and left. [Rep. Tr. pp. 795-796.] Linda denied having seen Miss Ramirez' purse at the house. [Rep. Tr. p. 797.] On cross-examination, she was asked when it was that she saw the charga-plate and replied that it was "maybe" the middle of January. [Rep. Tr.

p. 798.] On that date she had seen Bookman and Jackie with some cardboard boxes containing a new black trench coat, a sweater and some shirts. [Rep. Tr. pp. 800-802.]

Stewart took the stand in his own behalf. He denied having robbed and kidnaped Mrs. Wells but he admitted signing Wells' name to the dividend checks and cashing them in the presence of Lena Franklin, whom he had known for over two years and whom he had met through her brother-in-law, Herschel Duerson. He obtained the checks from Jackie Jackson, who asked him if he knew where to get some checks cashed; he had previously cashed checks for her without any difficulty. [Rep. Tr. pp. 817-820.] He also testified that Lillian had many purses. Stewart was shown Mrs. Wells' purse and said that he first saw it at the police station on January 31st. He said that he never denied to the officers having cashed the dividend checks. When asked whether he took Miss Mitchell's purse, he said he did not and when asked whether he had anything to do with her injuries, he returned the same answer. [Rep. Tr. pp. 820-822; Rep. Tr. of November 19, 1963, pp. 26, 30.]

Stewart was asked whether he had admitted his guilt of the Mitchell robbery and murder to Sergeant Logue and he explained that he had several conversations with the officer, that each time he asked Logue about his wife and Logue told him that she was sick, not eating and throwing up, and that when the officer asked him about the murder, he said he knew nothing about it. When Stewart asked Logue when she was going to be released, the latter said he was not going to release her and that he would keep everything le-

gal and "book you for murder beef." Stewart told Logue that there was no sense booking her for murder and Logue replied that he was going to "turn everyone else loose" and only hold him and Lillian. Stewart asked to talk to her and when permitted to do so, he told her he was going to confess to the Mitchell murder so that she could be released since the officer "won't cut you loose until I confess to the murder beef." Lillian told him not to confess but he told her he would because he was not going to see her go to county jail as she was "in the family way." [Rep. Tr. pp. 823-824.] Before giving his confession, he knew none of the details of the killing and Logue told him how and where it had occurred. [Rep. Tr. pp. 824-825.] Stewart testified that he bought Miss Mitchell's watch from Bookman and Jackie Jackson but he knew nothing about her credit card and her other possessions. Logue told him there was no point in "denying these things" since he would be convicted anyway because of his prior record. [Rep. Tr. pp. 825-826.]

On cross-examination, Stewart admitted having been convicted of possessing narcotics in 1953 and having been convicted of robbery in 1957. [Rep. Tr. pp. 827-828.] He did not ask Jackie Jackson where she obtained the Wells checks. [Rep. Tr. p. 832.] He denied having told Logue and Mangiameli on the evening of January 31st that he had never seen them and denied having made the same statement to Logue and Jensen during their conversations on February 1st. Nor did he tell Logue that if he could speak to Lillian he might say something about them. [Rep. Tr. pp. 833-834.] Although he spoke to Lillian on February 3rd, he denied having told Logue and Mangiameli after talking

to her that he found the checks by a tree at 37th and Western, and he denied having said at that time that they were not in a purse and denied having said then that he signed and cashed them. [Rep. Tr. p. 835.]

Upon being shown Mrs. Wells' purse, Stewart said that he had a purse similar to it when he moved into 1912 West 39th Street; a friend of his moved the purse for him. [Rep. Tr. pp. 836-837.] He denied, however, that the Wells purse was the one Logue had shown him at the police station and which he then admitted having brought to the duplex. [Rep. Tr. pp. 838-840.] He also denied having seen Mrs. Wells' wallet at his house and said that he first saw Miss Mitchell's watch at about 9 p.m. on January 19th, when Jackie Jackson and Louis Bookman came to the house. Bookman asked him if he wanted to buy a watch, and he paid Bookman $15 for it. He denied having told the officers that he never saw the watch; he told them that someone had brought the watch to his home; he never told them that he bought it on the street or that he got it from Miss Mitchell; he admitted not having told them the name of the person who brought the watch to his house. [Rep. Tr. pp. 840-844.]

Stewart testified further that Logue first mentioned Lillian was sick in a conversation on February 2nd or 3rd, when no other officer was present. [Rep. Tr. pp. 849-850.] They were married by proxy in Mexico in October 1962. [Rep. Tr. pp. 852-853.] When he talked to Lillian on February 3rd, she was emotionally upset but not physically ill. [Rep. Tr. pp. 853-854.] Logue told him she was sick during their conversations on the 3rd and 4th, and said that if he would tell them about

"the murder beef" she would be "cut loose"; he did not then know what murder the officer was talking about. [Rep. Tr. pp. 855-857.] On February 4th, Stewart asked Logue if he could talk to Lillian and said that when he talked to her he might have something he wanted to tell him, but when asked by the district attorney what he had in mind, he said that he would "rather not answer that" and when directed to reply, he refused to answer. [Rep. Tr. pp. 858-859.]

According to Stewart, Logue took him to the interrogation room on the morning of February 5th. Before Mangiameli arrived, Logue asked him when he was "going to cut Lillian loose" and he said the he did not have a key to the jail. Logue then repeated that Lillian was sick, suggesting that she should not "take a rap" for something he did; Stewart said, "I don't know nothing." [Rep. Tr. pp. 862-865.] When Mangiameli arrived, Logue asked him if he was going to confess and when he said he would not, Mangiameli said that he might as well "cop out to it" because Logue "got you good." Stewart asked Logue how Lillian was doing and Logue said that she was sick. He was taken to his cell, then returned to the interrogation room where he talked to Lillian, who was upset but not physically ill. He was again taken to his cell, then returned again to the interrogation room. [Rep. Tr. pp. 865-871.] There he asked Logue if Lillian was to be released and the latter said that she would be released as soon as he told them what they wanted to know. Stewart asked Logue what he wanted to know, Logue mentioned "the murder beef," and appellant said, "Yeah, I done it." [Rep. Tr. pp. 872-873.]

Upon further cross-examination, Stewart admitted seeing Miss Mitchell's transistor ear plug on his couch around January 26th but he did not know how it came to be there; he denied having seen her cuff link. However, he admitted seeing her charga-plate in the possession of Jackie Jackson around January 22nd; Jackie did not tell him where she had obtained it; he next saw it when it was exhibited to him at the police station. [Rep. Tr. pp. 877-879.] He concluded his testimony by stating that the only reason he told the officers that he took Miss Mitchell's purse, knocked her down and kicked her was to obtain Lillian's release. [Rep. Tr. pp. 880-881.]

Sylvester Creal, called as a defense witness, testified that he took Stewart's belongings to Lillian's house when the latter moved there. Among the things Creal moved was a purse, but upon being shown Mrs. Wells' purse, he said it was not the one he carried to Lillian's. [Rep. Tr. pp. 934-935.]

Jackie Jackson, Stewart's niece, was known as Dolores Watson, Mary Jean Terry, Dolores Whitmore and Gloria Jean Whitmore. She was 24 years of age and in county jail at the time of trial. [Rep. Tr. pp. 882-883.] Jackie had known Stewart since her early childhood and had known Louis Bookman for about three years; she was "pretty tight" with him. When asked what Bookman did for a living, she said: "snatching purses and knocking peoples in the head," an occupation in which she assisted him. [Rep. Tr. pp. 884-885.]

Jackie testified that she had seen both Mrs. Wells' charga-plate and Miss Mitchell's charga-plate in Bookman's possession; they used the Mitchell charga-plate

at Bullock's and left some of the "stuff" they obtained at Stewart's house; in December or January, she saw Bookman with the Wells charga-plate. [Rep. Tr. pp. 885-887.] She testified further that she saw Bookman with Miss Mitchell's watch. She was present when Bookman sold it to Stewart and she loaned Stewart $5 to apply on the purchase price. [Rep. Tr. pp. 887-888.] Jackie was at Stewart's house practically every day, entering without a key; she had "a way to get in." She left a number of purses Bookman had given her on the back porch. Shown the three Wells dividend checks, she said that she bought them from Bookman for $10 and had Stewart cash them for her. [Rep. Tr. pp. 888-889.]

On cross-examination, Jackie testified that she gave Stewart $20 or $25 in return for cashing the checks. When asked when the incident occurred, she said she thought it was in December. [Rep. Tr. p. 891.] When asked when she first saw the Wells charga-plate, she said it was in December, and when asked when she first saw the Mitchell charga-plate, she said it was approximately the first week in January. Upon being asked when she first saw the Mitchell watch, she said she first saw it in a box in Bookman's car in the latter part of December. Then she said that she saw it on a Wednesday night before Christmas in December when Bookman first obtained it. At that time she was driving with Bookman and Slim Evans, Bookman told her to wait near 36th and Western, he left the car, and when she next saw him he had the watch; it was not then in a box. [Rep. Tr. pp. 894-899.] She last saw Bookman during the first week in January on 95th and Avalon. Then she said she last saw him during the

first week in February and said she obtained the watch about two and one-half or three weeks before the February date. [Rep. Tr. pp. 901-903.]

When asked how long she had helped Bookman snatch purses and hit people on the head, she first said "approximately three to four-and-a-half, five hours, sometimes longer," then said she had been with him for three years; she drove a car for him. She testified next that she, Bookman and Slim Evans drove to 35th and Cimarron at about 7 p.m. on January 19th, they parked the car, she knocked on the door of a white house and Bookman and Evans rushed in. An old colored lady came to the door. When asked to describe her, Jackie replied: "I don't remember because I fell the same time she fell." She explained that the lady came out the door, got on the sidewalk and she accompanied the lady, talking to her for about five minutes about "some soaps" that she was selling, then something hit the lady and they both fell. When Jackie got up, Evans and Bookman were standing over them and she returned to the car. [Rep. Tr. pp. 903-910.] After returning to the car, she saw Bookman and Evans coming back from Western down 35th and she picked them up; it was then that she first saw the watch. [Rep. Tr. p. 912.] At the same time, she saw the charga-plate, two cuff links, and a transistor radio. [Rep. Tr. pp. 913-914.]

Jackie was asked whether she used names other than those she mentioned on direct and she admitted having used six others because of her parole. [Rep. Tr. pp. 916-918.] She described Bookman as a dark-skinned Negro, approximately 6'2" to 6'3" in height, weighing about 210 to 220 pounds. [Rep. Tr. p. 918.] She was

shown the Wells purse and said she could not recall it, and upon being shown the Miyauchi purse, the Dixon purse and the Ramirez purse and wallet, she said she was not sure whether she had seen them before. [Rep. Tr. pp. 919-920.] When asked whether she placed any of the foregoing items on Stewart's porch, she said: "I'm not sure but it look like them," and said she put them on his porch sometime in January. She said further that Miss Mitchell was carrying her purse on her left arm and the transistor in her left hand, explaining that she kept the radio but later lost it. [Rep. Tr. pp. 921-923.]

Jackie first learned that Stewart was charged with the various robberies when Logue came to talk to her after her arrest on January 31st. Logue tried to make her say that Stewart was her boy friend but she denied it and told him to "find out the best way you can." [Rep. Tr. pp. 927-928.] When asked whether she ever told anyone about Bookman, she said that she would have told Logue "but he did not approach me right, so I didn't tell him anything." [Rep. Tr. p. 929.] When asked whether she was with Bookman on January 10th, she said she was with him "a lot of times in the morning" but did not remember the date and when asked whether she was with him on January 25th, she said she was not very good at remembering because she had convulsions. Upon being asked whether she was with Bookman on January 30th, she replied that they were staying together in January but she could not "recall what dates." [Rep. Tr. pp. 929-930.]

Earlier on cross-examination, Jackie had said she was born in 1938 but she later testified that she was

born on June 20, 1943, "but I don't go under that date." When asked why she used the 1938 date, she said: "Because I was trying to throw my parole officer off of who I was." [Rep. Tr. pp. 918, 930-931.] Jackie denied that on January 31st Sergeant Logue showed her the items which had been exhibited to her during cross-examination and also denied that at that time she told Logue she had never seen any of them before. [Rep. Tr. pp. 931-932.]

Rebuttal.

Sergeant Logue was recalled by the People in rebuttal. Logue testified that Jackie Jackson, James (Slim) Evans, Lillian Lara and a man named Vernon were arrest for robbery at the time of Stewart's arrest; all were released in the late afternoon of February 5th because there was no evidence to connect them with any crime. [Rep. Tr. p. 937.] Logue had a conversation with Jackie Jackson on January 31st, showing to her the items taken from Mrs. Dixon, Mrs. Wells, Miss Ramirez, Mrs. Miyauchi and Miss Mitchell. He identified each item to Jackie, asking her if she knew anything about it; in each instance she replied that she did not. [Rep. Tr. pp. 938-939.] Bookman's name was never mentioned. [Rep. Tr. p. 940.]

Logue denied telling Stewart that Lillian was sick or upset and likewise denied telling him that Lillian would be released if he would make a confession. He arranged for Lillian to talk to Stewart on February 3rd and denied that she was taken to the University Station to see him on any other date in February. [Rep. Tr. pp. 940-941.]

Logue testified that during their conversation on the evening of January 31st, Stewart said he spent

the previous night at his girl friend's house and that he stayed with her only two or three times a week. Stewart told the officers he thought "that qualified as a permanent address." [Rep. Tr. p. 969.] Logue showed him two of the Wells dividend checks and he said that he had never seen them before and had not endorsed them, explaining also that he did not know Lena Franklin. He gave his girl friend's name as Lillian Davis. After about fifteen minutes, Lena Franklin was brought into the room and said that she knew Stewart as "Roy Wells." Stewart said that he did not know Lena, said he had been in Newman's Market but had never cashed a check there and denied finding the checks. [Rep. Tr. pp. 969-971.] In Stewart's presence, Lena Franklin described the cashing of the checks and said that she had met Stewart in December. [Rep. Tr. pp. 972-973.] Logue reemphasized that the Wells purse was the one he had removed from Stewart's house, had shown to Stewart, and which Stewart said he brought to Lillian's from his former residence. [Rep. Tr. p. 989.]

The conversation of January 31st was recorded and a transcript of the recording was played to the jury; it confirmed Logue's rebuttal testimony in every material respect. [Rep. Tr. pp. 1045-1058.] When Lena confronted Stewart and said he had signed the checks, he made no reply. [Rep. Tr. pp. 1058-1059.]

Sergeant Salvatore L. Mangiameli was also called in rebuttal. Mangiameli testified that he was present during the conversation between Logue and Stewart on the morning of February 3rd. Stewart said he found the Wells dividend checks by a tree at 37th and Western and that he moved the Wells purse to Lillian's house from a

former address. [Rep. Tr. p. 961.] Mangiameli was present during the conversation between Logue and Stewart on the morning of February 4th. Stewart was shown the Mitchell watch and said he had never seen it before. Mangiameli was also present during the conversation between Stewart and Logue on the afternoon of the 4th. The watch was again shown to Stewart, who said that someone whom he did not identify had brought it to his house; he later said that he bought the watch on the street and gave it to Lillian. [Rep. Tr. pp. 961-963.]

Shortly after 8:30 a.m. on February 5th, Mangiameli was present during another conversation between Stewart and Logue. Stewart said he had snatched Miss Mitchell's purse, taken her watch and kicked her. Logue left the room, returned, and after his return Stewart repeated the statement. [Rep. Tr. pp. 963-964.] According to Mangiameli, Lillian was brought to the University Station only on February 3rd and not on February 5th. He was present during many of the conversations between Logue and Stewart, and never heard Logue say that Lillian was sick, not eating, not sleeping or throwing up. He never heard Logue make any promises to Stewart, to induce him to confess, and on occasions when he was alone with Stewart he made no promises to him. [Rep. Tr. pp. 964-966.]

Sergeant A. R. Jensen was also called in rebuttal. Jensen testified that he was present during a conversation between Logue and Stewart at about 11 a.m. on February 1st. The Wells checks were shown to Stewart and at that time he denied having seen them, signed them or cashed them. Jensen was present during another conversation at about 3 p.m. on the same day and Stewart made the same denials. At that time Stewart said he

wanted to speak to Lillian and that he might have something to say about the checks. [Rep. Tr. pp. 1003-1004.]

Mrs. Thomas was recalled as a People's witness. She testified that Miss Mitchell did not own a transistor radio prior to January 1963, and received one from Cyrus Mitchell, Mrs. Thomas' father, about the first of the year. The radio had an ear plug and case similar to the one found in Stewart's house. Mrs. Thomas did not see the radio on January 20th but she saw it on January 21st at Miss Mitchell's house, where it remained until the death of Cyrus Mitchell on May 1st. [Rep. Tr. pp. 1005-1007.] The radio came into the possession of Mrs. Thomas and she kept it until May 3rd. [Rep. Tr. pp. 1007-1008.]

The Penalty Trial.

On the penalty phase of the case, the People introduced documents establishing that Stewart had suffered two prior felony convictions of possessing narcotics and robbery. [Rep. Tr. pp. 1234-1235.]

Callie Durham, Stewart's sister, testified on his behalf that he was 28 years old. He was one of six children and was born in Arkansas, the son of an illiterate sharecropper; the entire family slept in two bedrooms. When Stewart was seven, the family moved to Phoenix and when he was ten, his mother died and his father remarried. [Rep. Tr. pp. 1236-1238.] His education stopped at the 6th grade. [Rep. Tr. pp. 1239-1240.]

Stewart testified briefly. He said that his narcotics conviction was for possessing one marijuana cigarette and he was sent to the Youth Authority. His robbery conviction was for second degree robbery involving three friends of his and someone he did not know; the man

"wanted to have some fun with a girl. So we just took him outside and took his money." [Rep. Tr. pp. 1241-1242.]

Summary of Argument.

1. This case presents the issue whether *Escobedo v. Illinois,* 378 U.S. 478, should be extended. Stewart gave a voluntary confession and made no request for counsel during the course of the investigation. Under *Escobedo,* therefore, his conviction can and should be upheld.

2. *Escobedo* should not be extended as far as the California Supreme Court has extended it in this and in other cases. The "Dorado rule," which dictated the reversal in this case, requires the police, with certain limited and fortuitous exceptions, to advise any suspect in custody whom they wish to question, of his right to counsel and his right to remain silent at an "accusatory stage" which commences, for all practical purposes, at the time of arrest. The rule conditions a denial of "the Assistance of Counsel," not upon an affirmative act of denial, but upon a simple failure to give legal advice.

3. The "Dorado rule" is not needed as a deterrent because traditional standards of voluntariness are adequate to protect persons in custody from police coercion.

4. The "Dorado rule" freezes permanently into the Constitution what we believe are undesirable limitations on the legitimate investigative powers of the police.

5. The "Dorado rule" supplements the standards of voluntariness with a system of warnings and waivers that will not clarify the problem of determining the admissibility of extra-judicial statements.

ARGUMENT.

I

The "Dorado Rule" Is an Unnecessary Extension of Escobedo v. Illinois.

A. The "Dorado Rule" Purports to Be a Constitutional Command.

On June 22, 1964, this Court decided *Escobedo v. Illinois*, 378 U.S. 478. At the beginning of its opinion, this Court framed the issue as follows:

> "The critical question in this case is whether, under the circumstances, the refusal by the police to honor petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S. 335, 342, and thereby renders inadmissible in a state criminal trial any incriminating statement elicited by the police during the interrogation." (*Id.* at 479.)

And, at the end of the opinion, this Court ruled as follows:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer,

> and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' Gideon v. Wainwright, 372 U.S., at 342, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial." (*Id.* at 490-491.)

On January 29, 1965, the California Supreme Court decided *People v. Dorado*, 62 Cal. 2d 338, 398 P. 2d 361. In the body of its opinion, and in the course of elaborating what has come to be known as the "Dorado rule," the California Court held:

> "We conclude, then, that defendant's confession could not properly be introduced in evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) *the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and no evidence establishes that he had waived these rights.*" (62 Cal. 2d at 353-354, 398 P. 2d at 371. Emphasis added.)

This case is a child of *Dorado* and a grandchild of *Escobedo*. Applying *Dorado*, the California Court held it reversible error to allow in evidence Stewart's volun-

tary confession to the murder of Miss Mitchell. Despite the fact that Stewart did not request counsel and was not denied counsel, the Court ruled that the authorities were obliged to advise him of his right to counsel and his right to remain silent and that it would not be presumed from a silent record that they did so. (*People v. Stewart,* 62 Cal. 2d 571 at 579-581, 400 P. 2d 97 at 102-103.)

There can be no doubt as to the character of the "Dorado rule." It is not a state rule of evidence designed to implement specific guarantees of the Bill of Rights or to give flesh to the vaguer contours of due process. (Compare *People v. Cahan,* 44 Cal. 2d 434, 282 P. 2d 905, with *Mapp v. Ohio,* 367 U.S. 643 and *Ker v. California,* 374 U.S. 23; compare *People v. Aranda,* 63 A.C. 542, 407 P. 2d 265, with *Delli Paoli v. United States,* 352 U.S. 232 and *Jackson v. Denno,* 378 U.S. 368.) On the contrary, the California Court regards it as a command of the Constitution. As Chief Justice Traynor said in a later case:

> "The reasons and authorities set forth at length after the hearing and rehearing in *People v. Dorado,* 62 Cal. 2d 338 [42 Cal. Rptr. 169, 398 P. 2d 361] compelled this Court, as they have other courts, in being faithful to the Constitution of the United States as interpreted by the United States Supreme Court, to hold that the rule of the Escobedo case does not depend upon a request for counsel." (*People v. Roberts,* 63 A.C. 79 at 89, 403 P. 2d 411 at 417.)

B. Stewart's Conviction Must Be Sustained Unless the "Dorado Rule" Is, in Fact, a Constitutional Command.

The facts in *Escobedo* are so well known that it would be superfluous to repeat them. Suffice it to say that while being questioned by the Chicago police, Escobedo sought to consult with his own attorney, his attorney sought to consult with him, and their requests were effectively refused.

The facts of this case differ from those of *Escobedo* in every respect which this Court deemed essential to the *Escobedo* reversal. Stewart was not kept from consulting with his lawyer. He was not kept incommunicado. He was not questioned by a prosecuting attorney. No accomplice was sent in to accuse him falsely. The questions asked him involved no subtle points of law unknown to laymen. For the most part, they concerned the stolen property that was found in his own home.

Stewart was 28 years old at the time of trial. He had previously been convicted in the Los Angeles Superior Court of robbery and possessing narcotics. Although he attributed his confession to a promise to release Lillian Lara, his testimony was unworthy of belief. Lillian had been arrested because the Mitchell watch and the Miyauchi purse were found among her jewelry and clothing in a bureau drawer in the bedroom and because a key attached to the purse opened the front door of the house. The officers denied using Lillian as a pawn to obtain his confession. Despite the confession, Stewart denied robbing Mrs. Wells, Mrs.

Dixon, Mrs. Miyauchi and Miss Ramirez. Although this Court refrained from finding that Escobedo's confession had been coerced, the conduct of the Chicago police radiated an aura of impropriety. Stewart's confession, however, was the product of his own will and his own remorse. Otherwise, why would he have admitted killing Miss Mitchell and denied having robbed the other four women? Even a six-year-old child knows that killing is worse than stealing.

It is accordingly unnecessary for us to ask that *Escobedo* be overruled. Under the *Escobedo* facts and the *Escobedo* holding, Stewart's conviction can and must be sustained. All we ask is that *Escobedo* not be extended, for it is clear that the California Court has excised from the *Escobedo* holding the element of a request for counsel and the refusal of the request, and has grafted onto that holding the elements of a warning and a waiver.

C. The Reasons Assigned for the "Dorado Rule" Do Not Warrant Its Acceptance as a Command of the Constitution.

The Court advanced two principal reasons for extending *Escobedo*. First: Placing a living screen between the suspect and the police will reduce the chances of coercion. (*In re Lopez*, 62 Cal. 2d 368 at 372-75, 398 P. 2d 380 at 383-85.) Second: Advising all suspects of their rights will protect the poor, the ignorant and the unwary. (*People v. Dorado*, 62 Cal. 2d 338 at 351, 398 P. 2d 361 at 369-70.) We challenge both bases for the "Dorado rule."

1. Everyone knows that there are a few officers who indulge in the kind of questioning condemned by the decisions of this Court, just as there are a few

who accept bribes and plant evidence in the pockets of innocent people. But we do not believe that in every police station there is a little room where people are beaten or subjected to less visible pressures to get them to confess. Over the years, this Court has formulated detailed standards of voluntariness and has applied them in a host of cases, culminating in the exclusion of a statement "secured by so mild a whip as the refusal, under certain circumstances, to allow a suspect to call his wife until he confessed. *Haynes v. Washington,* 373 U.S. 503." (*Malloy v. Hogan,* 378 U.S. 1 at 7.) We think that these standards are workable, that they are being followed, and that they need not be replaced by any stronger whips. Indeed, it has been said that "[a]s a deterrent, *Escobedo* looks like an atomic bomb used to effectuate a slum-clearance project." (*Escobedo* in the Courts: May Anything You Say Be Held against You?, 19 Rutgers L. Rev. 111 at 135.)

2. Everyone knows that some suspects can afford to hire lawyers while others can not, and there is understandable concern with "the unknowing defendant who responds to police questioning because he mistakenly believes he must and that his admissions will not be used against him." (Mr. Justice White, dissenting in *Escobedo v. Illinois,* 378 U.S. 478 at 499.) But as Mr. Justice White went on to note: "Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights." (*Loc. cit.*) And the reasoning of the California Court is based upon two questionable assumptions, one of law and one of fact. We take issue with each.

The first assumption is an unarticulated hypothesis that the Sixth Amendment has been "incorporated" or "absorbed" into the equal protection clause of the Fourteenth Amendment. This Court has indeed said that if a state provides a system of appellate review the system must be open to all on equal terms. If a man is too poor to hire a lawyer to write a brief, the state must pay a lawyer to write one. (*Douglas v. California,* 372 U.S. 353.) If he is too poor to buy a transcript, the state must buy him one. (*Griffin v. Illinois,* 351 U.S. 12.) But there is no analogy between a judicial procedure set up to vindicate the rights of convicted persons and the informal process of gathering evidence which may not even be presented at a trial.

The second assumption is that most suspects do not know their rights and must be told of them. This is surely untrue, not only of recidivists like Stewart, but also of the vast majority of citizens in a country where, by ten years ago, the privilege against self-incrimination had already "attained the familiarity of the comic strips . . ." (Mr. Justice Frankfurter, concurring in *In re Groban,* 352 U.S. 330 at 337.)

Stewart knew perfectly well what he was about while prowling the streets of a city in which he had twice before been convicted of serious crimes. He was cunning enough to use his hands and feet as his principal weapons, cunning enough to leave no fingerprints, cunning enough to work before sunrise and after dark, and cunning enough to strike from behind, so that he could not readily be identified. That cunning did not desert him on the witness stand. At one point during cross-examination, Stewart testified that he asked the officers on February 4th if he could

talk to Lillian Lara and said that after he talked to her he might have something to tell them. When asked what he had in mind, he said: "I would rather not answer that," and when the judge directed him to answer, he flatly refused to comply. [Rep. Tr. pp. 858-859.] Since Stewart was sufficiently firm to defy the judge and the district attorney in open court, he must surely have known that he did not have to respond to questioning by the police.

In summary, therefore, we maintain that the reasons assigned by the California Court do not support its view that *Dorado* is entailed by *Escobedo*. It is now time to give our own reasons why *Escobedo* should be limited to its facts and to penumbral variations of its facts.

II.

The "Dorado Rule" Is an Undesirable Extension of Escobedo v. Illinois.

A. As Interpreted and Applied, the "Dorado Rule" Unjustifiably Inhibits the Legitimate Questioning of Uncautioned Suspects Except Under Fortuitous Circumstances.

The "Dorado rule" is, of course, a rule of exclusion. It applies not only to confessions and incriminating admissions, but also to exculpatory statements later proved to be false. (*People v. Hillery*, 62 Cal. 2d 692, 401 P. 2d 382; *People v. Nye*, 63 A.C. 162, 403 P. 2d 736; *People v. Williams*, 63 A.C. 471, 406 P. 2d 647.) And it serves to exclude, at a subsequent trial, the testimony of a defendant given at a former trial, where it appears that the former testimony was impelled by the need to explain a confession or admission

improperly received under *Dorado.* (*People v. Polk,* 63 A.C. 461, 406 P. 2d 641.)

In the present case, the California Court clarified the "Dorado rule" by adopting what has come to be known as the "Stewart test." The test was designed to determine the advent of the "accusatory stage" of a police investigation: that is, the time when the police are required, under *Dorado,* to advise a suspect of his right to remain silent and his right to counsel.[4]

The Court began by saying that an arrest satisfies the first two conditions of the *Escobedo* holding: that "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect" and that "the suspect has been taken into police custody." (*People v. Stewart,* 62 Cal. 2d 571 at 577-578, 400 P. 2d 97 at 101.)[5] Then the Court turned to the third *Escobedo* condition. How was it to decide whether the police had carried out "a process of interrogations that lends itself to eliciting incriminating statements?" Disregarding "the subjective intent of the interrogators," the Court said it would analyze "the total situation which envelops the questioning by considering such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances." (*People v. Stewart,* 62 Cal. 2d 571 at 579, 400 P. 2d 97 at 102.)

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[4]It is now settled in California that both warnings must be given. (*People v. Stockman,* 63 A.C. 519 at 524-25, 407 P. 2d 277 at 280-81.)

[5]It is now settled in California that these conditions can be met even before an arrest if, under certain circumstances, the suspect is merely detained for questioning. (*People v. Furnish,* 63 A.C. 536 at 540-41, 407 P. 2d 299 at 302-03.)

It may be objected at the outset that the foregoing test is of little help as a guide to prospective police conduct. In terms, it is a retrospective formula for determining whether a defendant's incriminating statements should have been admitted or excluded at his trial. All it tells the investigating officer is that his own conduct is relevant and that all other relevant circumstances are also relevant. But it is clear from the later California cases that unless there is proof to the contrary, the Court will presume that a "process of interrogations" was one which did lend "itself to eliciting incriminating statements." (*People v. Stockman,* 63 A.C. 519 at 523-24, 407 P. 2d 277 at 280, and cases cited.) And, in one case, the Court specifically held that it would apply the same presumption where "no evidence indicates that the statements are in the nature of spontaneous disclosures." (*People v. Luker,* 63 A.C. 485 at 494-95, 407 P. 2d 9 at 15.)

By now there can be no doubt of the reach and scope of the "Dorado rule" as clarified by the "Stewart test." Subject to the exception noted above and one to be noted below, no statement made by a suspect to the police after his arrest can be admitted in evidence against him, unless, at the very least, he has been advised of his right to remain silent and his right to counsel and has knowingly and intelligently waived these rights. Bearing in mind that an arrest without a warrant may be made upon probable cause, that most arrests are made without a warrant, and that probable cause may be based upon hearsay which is inadmissible at a judicial trial, it is plain that the California Court has obliterated the distinction between "investigation" and "accusation" which, in *Escobedo,* this Court

was so careful to preserve, and has accepted, in all but name, the stringent view that the right to counsel attaches, *ex proprio vigore,* and with all its ramifications, no later than the time of arrest.

The two exceptions reinforce what has just been said. Statements elicited in order to save another's life may be admitted because of the need for saving life. (*People v. Modesto,* 62 Cal. 2d 436, 398 P. 2d 753; *People v. Jacobson,* 63 A.C. 335, 405 P. 2d 555.) And, as previously mentioned, spontaneous, unsolicited statements may also be admitted, including an unprompted and uninterrupted narrative given in response to a neutral inquiry, such as "What happened?" (*People v. Cotter,* 63 A.C. 404, 405 P. 2d 862. See also, *People v. Dorado,* 62 Cal. 2d 338 at 354, 398 P. 2d 361 at 371; *People v. Jacobson,* 63 A.C. 335, 405 P. 2d 555; *People v. Luker,* 63 A.C. 485 at 494-95, 407 P. 2d 9 at 15.)

The Court has indeed declared that it does not intend "to discourage a defendant from volunteering to the police his complicity in the perpetration of a crime nor to prohibit the police from receiving and acting upon such confessions." And it has also declared that it has never "taken the position that the desire of a guilty man to confess his crime should be stifled, impeded, discouraged, or hindered in any way." (*People v. Cotter,* 63 A.C. 404 at 412 and 414-15, 405 P. 2d 862 at 866 and 868.)

Yet if the police can only receive and act upon statements which are actually volunteered or are obtained in order to preserve life, then the admissibility of the voluntary confession of an uncautioned suspect will de-

pend upon how quickly he feels remorse or upon the fortuitous chance that an undiscovered victim may still be alive. We submit that this is not and should not be the law.

B. Requiring a Warning Will Unjustifiably Inhibit the Legitimate Questioning of Suspects Under Any Circumstances.

The officers who arrested Stewart, questioned him and took his voluntary confession surely thought that they were investigating a series of unsolved crimes. His house was littered with stolen property, some being found in a bedroom closet, some in bureau drawers, some on top of a television set and some under a pile of dirty shirts on the back porch. At the time of his arrest, the officers had good reason to believe that he had fraudulently endorsed and cashed the dividend checks belonging to Mr. and Mrs. Wells. Four other persons were in the house and for aught the officers knew, any or all of them might have been involved, if not in the robberies themselves, then as fences or receivers of stolen goods. Each robbery was accompanied by insensate and wholly unnecessary violence, one woman being kicked to death, one sustaining a broken jaw, one a fractured skull and nose, the others head injuries of a less grievous nature. The last robbery took place the day before Stewart's arrest. The officers had no way of exonerating anyone in the house except by asking questions. And this they proceeded to do.

Bearing in mind that Stewart made no request for counsel and that the most reasonable inference to be drawn from the record is that he knew he did not have to speak, what course of action could he have taken had the officers advised him on the morning

of February 5th of his right to counsel and his right to remain silent? For that was the time when, according to the Court, the police were obliged to give a caution. (*People v. Stewart*, 62 Cal. 2d 571 at 579-80, 400 P. 2d 97 at 102.) It is obvious that Stewart could have done one of two things: requested an attorney or declined the assistance of counsel.

As mentioned earlier, the "Dorado rule" forbids, in the absence of a warning and a waiver, all but the most innocuous questioning of the most voluble suspects except in emergency cases. Will the American system of criminal justice be affected if the police are required to give legal advice? We fear that it will be, and that the effects will be grave, grave enough to give pause.

Thousands of serious criminal cases have been solved and could only have been solved by asking questions of the people most likely to know the answers.[6] It is not enough to say that the police should not resort to questioning, or that they should devise more dynamic, more skillful, more imaginative methods of detection. For the police can only find what the criminal has left for them to find. No miracle of modern technology can identify and preserve evidence when it does not exist.

Interrogation, therefore, is a necessary and unavoidable part of police work and one which society has found no means of replacing. But should the "Dorado rule" receive the *nihil obstat*, interrogation may well

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[6]According to the Police Commissioner of New York City, half the New York murder cases solved in 1963 and 1964 were solved either in whole or in part by means of a confession. (*United States v. Cone*, ... F. 2d .... [2d Cir.], at p. 3404 of Slip Opinion, fn. 18.)

be at an end. This conclusion is not ours alone. It has already been drawn by scholars who welcome the rule. (Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio S.L.J. 449 at 494 and 496-500; *Escobedo* in the Courts: May Anything You Say Be Held against You?, 19 Rutgers L. Rev. 111 at 135-39; Rothblatt, Police Interrogation and the Right to Counsel, Post Escobedo v. Illinois: Application v. Emasculation, 17 Hastings L.J. 41 at 52.)

A number of years ago, the late Mr. Justice Jackson wrote that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." (*Watts v. Indiana*, 338 U.S. 49 at 59.) The salt has not yet lost its savor. For the California Court said in a recent case: "As a discussion with counsel before interrogation cannot anticipate every possible question put to the accused (See Enker and Elsen, *Counsel for the Suspect* (1964) 49 Minn. L. Rev. 47, 64), the accused would seem to be entitled to have counsel with him during interrogation unless he clearly and knowingly waives that right." (*People v. Stockman*, 63 A.C. 519 at 525-26, 407 P. 2d 277 at 281.)

Suppose a man is arrested for felony and taken to the police station. There he is advised of his right to a lawyer and one is obtained for him out of a telephone book, from a referral list, or from the public defender's office. If he is guilty, it is desirable that he confess his guilt provided that no one makes him confess. If he is innocent, it is equally desirable that he be released.

The lawyer comes to the station knowing nothing at all about the case. The suspect presumably knows a good

deal about it or he would not be where he is. The lawyer cannot know what to allow him to say or whether to allow him to say anything until he knows both what the police know and what his new client knows. But the discovery rules do not apply to the police station and the police cannot stop investigating while the lawyer follows their tracks. Hence the lawyer will, if he is prudent, advise the suspect to say nothing, though doing so might delay disclosure of an alibi until the witnesses have disappeared, delay disclosure of some other defense until it is no longer credible, delay the tracing of stolen property until it is no longer traceable, or delay the identification of confederates until they can no longer be captured. Such incongruous and undesirable results find no support in the text of the Sixth Amendment, and none in its history, its purpose or its prior interpretation. (See Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 at 941-51.)

C. Requiring Warnings and Waivers Will Not Simplify the Task of Determining the Admissibility of Incriminating Statements.

The corollary of the *Dorado* warning is the *Dorado* waiver. There was no waiver in *Escobedo* for the reason that Escobedo was denied access to his own counsel and said nothing from which it could be inferred that he wished to dispense with his own counsel. Since *Escobedo* turned on the denial of a request, it does not follow from *Escobedo* that the police need obtain from a suspect who has made no request a knowing and intelligent waiver of his right to counsel before asking him any questions.

It might be supposed, given the "Dorado rule," that a suspect waives his privilege against self-incrimination by proceeding to answer questions after being told of his right not to. It might also be supposed that he waives his right to counsel by not asking for an attorney after being told of the right. But under *Dorado,* the police must decide, in the first instance, and not always at leisure, whether the suspect has "knowingly and intelligently" waived his rights, because without such a waiver they cannot ask him questions.

How are the police to determine whether any particular waiver is a "knowing and intelligent" one? As the California Court has said, resolving a waiver problem "requires a difficult though not impossible subjective determination . . ." (*People v. Mathis,* 63 A.C. 434 at 450, 406 P. 2d 65 at 75.)

The investigating officer is most likely to know if he gave a warning, but the suspect is most likely to know if he understood what the officer said. And if there was no warning, only the suspect will know if he was aware of his rights nonetheless. One suspect may be poor and ill-educated but capable of intelligent choice. Another may be rich and well-educated but incapable of intelligent choice. The officer must make a shrewd guess, and his margin of error will be one of constitutional dimensions.

Furthermore, once a case leaves the squadroom and enters the courtroom, it will be found that the subjective factors involved in determining the effectiveness of a waiver are essentially the same as those involved in determining the voluntariness of an extra-judicial statement. These include the age of the suspect, his

intelligence, his education, his prior experience with the law, his physical and emotional condition, as well as other variables. We question the value of superimposing upon the standards of voluntariness a new standard of admissibility involving the same percepts but different concepts.

In the present case, the record does not disclose whether Stewart was advised of his right to counsel and his right to remain silent. The California Court held that since he gave his confession before the decision in *Escobedo*, it would be impossible to impute to him a knowledge of rights which he could not know he had until *Escobedo* said he had them. (*People v. Stewart*, 62 Cal. 2d 571 at 581, 400 P. 2d 97 at 103.) But it must be kept in mind that Stewart had two prior felony convictions, that prior to *Escobedo* the California statutes recognized the right of arrested persons to contact counsel and of counsel to visit persons under arrest,[7] and that the most reasonable inference from the record is that Stewart knew he did not have to talk to the police. It must also be kept in mind that Stewart claimed that his confession was involuntary and that, as mentioned earlier, this Court has always weighed a defendant's ignorance of his rights in determining questions of voluntariness. If Stewart did not know his rights, surely that fact, if it was a fact, would have been brought out during the course of his own testimony. We submit, therefore, that even if the "Dorado rule" is correct, Stewart is in no position to invoke the rule.

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[7]Cal. Penal Code, §§ 825 and 851.5.

Conclusion.

The scope of *Escobedo v. Illinois* is one of the most urgent of current constitutional questions. It has divided the States and the Circuits. Our position is best summed up in the words of Chief Judge Lumbard, speaking for the United States Court of Appeals for the Second Circuit:

> "Until *Escobedo* it had never been seriously urged that the mere failure to advise a suspect of his right to remain silent and his right to counsel would of itself, absent other factors evidencing unfairness or coercion, invalidate the use of any statement made thereafter by the accused. Compare *Crooker v. California*, 357 U.S. 433, 441 (1958) (dissenting opinion). So far as federal practice is concerned, and so far as state practice was concerned until some recent state court extensions of language in *Escobedo*, the police of this country have not made it a practice to give such warnings. We are aware that for some years it has been the practice of the Federal Bureau of Investigation so to advise, but the Federal Rules of Criminal Procedure have recorded no such requirement. We find nothing in the language or prior interpretations of the Federal Constitution, or in reason, which requires that every person suspected of crime be advised of his rights to silence and to counsel, failing which *any* statement thereafter made is inadmissible. See *United States v. Wilson*, 264 F. 2d 104 (2 Cir. 1959)." (*United States v. Cone*, ... F. 2d ...., at pp. 3401-02 of Slip Opinion.)

It is accordingly requested that the judgment of the Supreme Court of California be reversed.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions Involved.

United States Constitution, Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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JOHN F. DAVIS,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,

No. 584. *vs.*

ROY ALLEN STEWART, Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

ERNEST ARTHUR MIRANDA, Petitioner,

No. 759. *vs.*

THE STATE OF ARIZONA, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Arizona.

MICHAEL VIGNERA, Petitioner,

No. 760. *vs.*

PEOPLE OF THE STATE OF NEW YORK, Respondent.

On Writ of Certiorari to the Court of Appeals of the State of New York.

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,

No. 762. *vs.*

STATE OF NEW JERSEY, Respondent.

On Writ of Certiorari to the Supreme Court of the State of New Jersey.

BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE.

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BRIEF OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AMICUS CURIAE.

QUESTIONS PRESENTED.

1. Does the decision in *Escobedo* v. *Illinois* extend beyond its facts to require, before interrogation, admonishment of the accused of his right to remain silent

and of his right of counsel, with failure to so proceed excluding from evidence any statement obtained thereby?

2. Does the rule announced in *Escobedo* v. *Illinois* have retrospective application?

INTEREST OF AMICUS.

The National District Attorneys Association is an organization of state prosecuting attorneys whose members in their official capacity represent approximately two-thirds of the population of the United States. It is upon these state prosecuting attorneys that the responsibility of presenting the overwhelming majority of criminal cases rests. The express purpose of the Association as amicus curiae is to delineate the grave concern (and the causes therefor) of prosecuting attorneys and law enforcement officers, if not that of all the people, with the adverse affect the Court's decision in these matters could have on the preservation of our free society—its safekeeping for all the people.

It is not for amicus to further discuss, dissect and distinguish, if possible or necessary, the law. Certainly the case law, the legal theories and the peculiar facts in the four matters presented here are thoroughly, indeed proficiently, covered by the parties.

The rules and regulations which have the force of statute are founded not only upon precedent but upon facts—and at times, necessarily, upon hypothesis. Therefore, it is believed that this Association can best serve the Court through the factual information, gathered by members of this Association, on the actual use of confessions. This data is offered for the Court's consideration in arriving at its decision on the questions before it.

In addition to the statistical data, it would seem that amicus can assist the Court by outlining the existing and

foreseeable difficulties as regards clarification, definition and retroactivity in application. Accordingly, with the consent of parties, this brief is respectfully submitted by the Association as evidence of its concern in and for the course of criminal justice, the future state of which will be determined in the matters now before the Court.

SUMMARY OF ARGUMENT.

Re: Interpretation of Escobedo v. Illinois.

Those entrusted by the people with the enforcement and administration of our criminal laws complain, as overburdened persons do, when short cuts are eliminated from their repertoire of expedients for effectively and adequately fulfilling the great burden and responsibility placed upon them. However, they recognize and accept reasonable rules which can be followed, though with some difficulty, and which have benefits far outweighing their inexpediency: *Mapp* v. *Ohio,* 367 U. S. 643 (1961), may well be an excellent illustration. Unlike *Mapp* which conclusively condemned a practice known to be unconstitutional, an extended *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), introduces a heretofore unknown standard of constitutionality.

Few would disagree with most of the Supreme Court decisions affecting law enforcement, finding the reversals (including *Escobedo*) correctly decided upon their facts. The difficulties of effective performance, experienced by those engaged in the enforcement and administration of our criminal laws (including and even emphasizing the judiciary), originate in the fact that the rules are promulgated upon the exceptional case and thereafter are subject to so many different interpretations. Why a case is allowed to advance to the appellate stage or why there is not a confession of error where there is an obvious violation of funda-

mental rights is influenced by local problems. And yet, the entire nation may be penalized for the sins of a few—albeit the case is atypical not only for the nation but for that locality.

The states have been described as fifty different countries. Officers vary from state to state, city to city, department to department. Police officers should not be subjected to symbolism—personifying evil in our midst. There are the good and the bad, the qualified and the unqualified, in the same manner as legislators, judges, firemen or medical doctors. We are a nation of specialists. Police officers, who will be directly affected by any extension of *Escobedo*, are specialists.. Prosecuting attorneys, trial judges and basically all appellate judges—although not specialists in the methodology of crime investigation—have worked closely with the problems and have expressed, almost unanimously, the opinion that *Escobedo* should not be afforded the extreme construction. Those courts which have ruled otherwise have done so because they believed the admonishment to be an inevitable Supreme Court command. Thus, their concern was with avoiding a backlog of cases from the date of *Escobedo* to its actual clarification. *People* v. *Dorado*, 62 Cal. 338, 398 P. 2d 361 (1965).

Those rules and regulations, which find themselves workable not because they are followed but because the populace in the first instance and the trial judges thereafter, both through misunderstanding and understanding, allow the standard to go unenforced, are not a preferred observance. One of the outstanding criminal law authorities in England, if not in the world, expressed this idea of operable-by-default rules in explaining the reason why certain restrictive measures can exist in his country without hindering police investigations: "The law works as well as it does chiefly because the moral authority of the police

enables them to get on without powers." Williams, *Demanding Name and Address*, 66 L. Q. Rev. 465, 476 (1950).

To be effective an admonishment must be more than a ritual. And the benefits received from a properly administered warning would not accrue to the innocent nor to the Culombes, Fikeses, Haleys, Paynes or Recks of our society. The beneficiaries are the professional and the recidivist. Without bestowing or acquiring a benefit, the American people cannot afford to abandon the confession as a form of evidence.

The objective of the admonishment cannot be to place a burden which becomes so onerous that it invokes devised extenuation. To resort to circumvention, although not intentionally illegal, nonetheless may markedly devaluate respect for law and order. A rule which can be rationalized by those who execute it does not offer the solution. The experience of the English in the use of the Judges' Rules is illustrative:

> The Rules undoubtedly require the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said *it is the general habit of the police never to admit to the slightest departure from correctness.* Devlin, The Criminal Prosecution in England 47 (1960). (Emphasis added.)

A rule for a rule's sake is not the answer.

In balancing the equities, it is obvious that eventually a point of diminishing returns is reached. The drawbacks which may result from an extension of *Escobedo* beyond its facts should be studied. To establish an absolute "enforcement-type exclusionary rule" can well lead to punishment of the populace rather than the police. Before *Mapp* v. *Ohio*, 367 U. S. 643 (1961), there was a warning to re-

assess given by the Court in *Wolf* v. *Colorado*, 338 U. S. 25 (1949). No one can now doubt that the Supreme Court can and will do as it states. However, crime waits for no man or court. But man can implement and adjust, given notice and a reasonable time to do so. Therefore, would it not be reasonable and proper for the Court to formulate a workable standard, without attaching thereto a dogmatic rule of exclusion? Cannot the state and federal authorities be given an opportunity to establish working rules, to increase the quantity and to improve the quality of their personnel and to otherwise effect the desired result? Certainly such good faith is being registered by governmental and private groups now engaged in these pursuits.

Under the guidance of an opinion by this Court, an advisory rule would afford an opportunity to accelerate research and to effect changes without the disastrous results of impediment and confusion. One step may well destroy that which we know, the other build that which we need. We respectfully request the Court to take the latter course: the advisory rule. We do not presume to suggest to the Court a drafted rule. The Judges' Rules of England were established as an advisory standard by the judges themselves but at the request of the police for their guidance. We would ask the same approach be taken. The members of this Association and prosecuting attorneys and law enforcement officers everywhere in this country stand ready to assist this Court in any manner which will further the objective of the proper enforcement of the criminal laws for the benefit of all the people.

Re: Retrospective Application.

The effect of retroactive application of *Escobedo* would involve all of the problems which such a determination would have had in *Mapp*, but for *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Angelet* v. *Fay*, 381 U. S. 654 (1965). The arguments presented by this amicus in *Linkletter* and *Angelet* are relevant and even more pertinent here. The reasoning of *Tehan* v. *Shott*, 34 U. S. L. WEEK 4095 (January 19, 1966), should be extended to *Escobedo* as well.

ARGUMENT.

CONFESSIONS (STATEMENTS) ARE VITAL IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES. THE EFFECT OF ADMONISHMENT OF RIGHT TO REMAIN SILENT AND, IN PARTICULAR, THE RIGHT TO COUNSEL AT THE INTERROGATION STAGE WILL MATERIALLY AFFECT THE ENFORCEMENT OF OUR CRIMINAL LAWS. TO GIVE RETROSPECTIVE APPLICATION TO THE NEW CONSTITUTIONAL STANDARD PROCLAIMED IN ESCOBEDO v. ILLINOIS WILL DIMINISH AND DETER EFFECTIVE LAW ENFORCEMENT. THE NEED IS FOR AN ADVISORY STANDARD, NOT AN EXCLUSIONARY RULE.

The issues before the Court stem from *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), and the requisite clarification of the five principles laid down by the Court in that decision: (1) if the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect; (2) if the suspect has been taken into police custody; (3) if the suspect is interrogated in a manner that lends itself to eliciting incriminating statements; (4) if the suspect has requested and been denied an opportunity to consult with his attorney and (5) if the police have not effectively warned him of his absolute constitutional right to remain silent, then any statement given by the accused is of no evidentiary value.

Two constructions of *Escobedo* have evolved, so-called the strict interpretation and the liberal interpretation. The strict interpretation is: *Escobedo* should be limited to its facts. If the request of the accused to consult with his attorney is refused, any confession elicited is inadmissible as being in violation of his right to have present the guiding hand of counsel—which right he did not intelligently waive.

This is the construction given by the majority of state and federal courts. The liberal interpretation is: no probative evidence may be obtained until and unless the accused has been duly admonished of his absolute right to stand silent to any and all inquiry, and furthermore, of his right to consult with an attorney. This is the construction assumed by a minority of the state and lower federal courts. Because of population and the consequent number of criminal cases, the most prominent advocate of this view is California. *People* v. *Dorado,* 62 Cal. 2d 338, 398 P. 2d 361 (1965). The two other state courts that have given this same interpretation are Rhode Island [*State* v. *Dufour,* 206 A. 2d 82 (R. I. 1965)] and Oregon [*State* v. *Neely,* 239 Ore. 487, 398 P. 2d 482 (1965)]. By having joined with this minority of state appellate courts, the Third Circuit Court of Appeals appears alone among the courts of appeal of the ten circuits. *Russo* v. *New Jersey,* 351 F. 2d 429 (3d Cir. 1965). Pennsylvania has revised its original construction in light of *Russo. Commonwealth* v. *Negri,* 213 A. 2d 670 (Pa. 1965).

I. ANY RULE DERIVED FROM ESCOBEDO v. ILLINOIS SHOULD BE LIMITED TO THE FACTS OF THAT CASE.

A. Escobedo Declares a New Constitutional Standard, Differing From Previous Court Decisions Restricting Police Investigation.

Whatever the purported rule is, it is new. Prior to *Escobedo,* the denial of counsel at any stage preceding arraignment was, at the very most, a factor in the "totality of circumstances" on the issue of voluntariness. Thus, differing from *Mapp* v. *Ohio,* 367 U. S. 643 (1961), and other cases which concerned fundamental rights, the denial of counsel, even upon request, was not a violation of any known constitutional precept. *Crooker* v. *California,* 357 U. S. 433 (1958). And so, when we speak of admonishing

the suspect, the accused or the witness of the right to stand silent and of the right of counsel at all investigatory stages, we embark on an uncharted constitutional course which leaves no opportunity for deviation. Either it is or it is not. It is clear that here there is no stated law, no comfort of precedent. *Escobedo* restrictions will affect the FBI and other federal officers as much as they will state officers. This is not a case where the federal officers have been following a procedure for years through the authority of the Court's supervisory powers, so that it is now time that state officers caught up. Admonishment of the right of counsel has never been required in the United States or England; the admonishment of right to remain silent has served only the military [Uniform Code of Military Justice, 10 U. S. C. § 831], the State of Texas [TEX. CODE CRIM. P. art. 727] and in England [Judges' Rules, [1964] 1 All E. R. 237].

An analysis of the various leading cases, chronologically from 1936 with their effect upon law enforcement, the courts and the prosecuting attorney of the states warrants consideration here:

Voluntariness. (Beginning with *Brown* v. *Mississippi*, 297 U. S. 278 (1936), to date without enumerating each case.) Although reasoning may differ on individual cases, few will question the rule on voluntariness as applied to the "totality of circumstances" concept in relation to voluntariness. It is to be noted that it always has been understood that "voluntariness" does not mean necessarily "volunteered." *Watts* v. *Indiana*, 338 U. S. 410 (1948). State authorities in general would agree (with one or two exceptions) with the Supreme Court that on the facts, the cases should have been reversed. None of these cases typifies state cases, and, of course, all involve a rather sensational crime, generally murder [25 murders, 1 manslaughter, 1 narcotics case, 4 cases of rape and 2 robberies:

Robinson, *Massiah, Escobedo and Rationales for the Exclusion of Confessions,* 56 J. Crim. L., C. & P. S. 412, 425 (1965)].

Arrest, Search and Seizure. Since the full effect of *Wolf* v. *Colorado,* 338 U. S. 25 (1949), did not come to rest upon the states until *Mapp* v. *Ohio,* 367 U. S. 643 (1961), it is only the results of the latter case that are pertinent here. While police officers, as overburdened public servants, may like the facility of short cuts to investigation, the view that illegal methods, especially flagrant or purposeful violations of the Constitution, should be countenanced by the courts, cannot be defended. The concern, of course, lies with what is "reasonable grounds" and what is "probable cause." There may well be individual cases which would allow opinions to differ, but few would differ with those cases brought to the attention of the Supreme Court. More debate may center upon some of the interpretations of other appellate courts, state and federal. In *United States* v. *Ventresca,* 380 U. S. 102 (1965) and *Linkletter* v. *Walker,* 381 U. S. 618 (1965), the Court provides reasonableness for law enforcement, thus enabling them to perform with diligence. Naturally there is concern when a police officer, who is stated not to be held to the judgment of a "legal technician," is reproved for failing to exercise the judgment which only could be expected from a legal technician. This is true in cases before all courts, in particular the appellate courts with bare majorities. It may be discouraging, but law enforcement officers will continue to do their best, appreciating that generally the courts understand their predicament so that the exception is the rule.

Right to counsel at trial and appeal; transcripts. Griffin v. *Illinois,* 351 U. S. 12 (1956), *Hamilton* v. *Alabama,* 368 U. S. 52 (1961), *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), *Douglas* v. *California,* 372 U. S. 353 (1963), *White* v. *Maryland,* 373 U. S. 59 (1963), and others involving right

to counsel at trial and appeal and to transcripts for appeal were not devastating; they directly concerned only a few states and the judicial process, as distinguished from the investigation-prosecution of crimes. Prosecuting attorneys and courts in the large majority of states were surprised at *Gideon*, not knowing beyond the confines of their own borders the practice in other states, and the *Hamilton* and *White* procedures also were foreign to them. For obvious reasons, defendants' demanding to try their cases without an attorney because of dispute with counsel is abhorred by courts and state counsel alike. Law enforcement officers were not affected directly by these decisions.

Other matters. Malloy v. *Hogan*, 378 U. S. 1 (1964): Again the impact was minimal. *Jackson* v. *Denno*, 378 U. S. 368 (1964): Although this decision affected several of our more heavily populated states, yet considering the country as a whole, it produced little change. Again, the direct impact was upon the state courts, not the prosecuting attorneys or law enforcement officers. *Griffin* v. *California*, 380 U. S. 609 (1965): Most prosecuting attorneys and courts were not even aware that this could be done. This procedure was prohibited by constitution, statute or court rule in at least 44 of the 50 states.

Differing from the foregoing, the determination of an absolute principle so unique as *Escobedo*, in any expanded interpretation, will forever frustrate the good law enforcement officer who tries to obey the rulings of this Court, only to find reasonable investigation methods subject to varying confusing findings on each of the principles associated with the *Dorado* interpretation of *Escobedo*, e.g., focus, investigatory stage, admonishment, custody, interrogation, statement-confession, etc.

B. The Effects of a Required Admonishment Will Inhibit the Interrogation of Criminal Suspects Without Benefit to the Innocent.

Will warning an individual of his right to remain silent and of his right to counsel preclude the needed confession? Frankly, no one knows and an empirical study is not possible. But, if the admonishment is without this effect, then, either it is being administered improperly or there is simply no reason for such a rule existing.

By assuming the posture of one accused (acknowledging the obvious limitations of this premise), namely his concern with discovery of the misdeed (if not other misdeeds) and his natural instinct for preserving freedom and life, it is possible to derive a valid answer. Consider his realization, having these innate anxieties, that the police know he is involved. Subjectively we know that misdeeds are not readily admitted. Some of the effects of a required admonishment include:

1.

Problems in the use of acceptable interrogation techniques already exist and to overcome the admonishment adds to that burden.

2.

Every confession will be tainted with the issue of waiver of counsel.

3.

The question then becomes: is waiver possible. If, in reply to an admonishment, the accused asks, "Should I get a lawyer? Why do I need a lawyer? What will a lawyer do for me? etc." Having reached this impasse, must the interrogator simply advise the accused to retain counsel and thereafter stop his attempt to learn the truth, or, is it

permissible for him now to proceed to convince the accused that he does not need an attorney? Can an accused ever effectively waive his right to counsel once he has mentioned, in response to a warning, that maybe he should have one? Thus, another issue to plague the courts is created.

4.

Admittedly, in the pretrial investigatory period which includes time for interrogation, the defendant is at a disadvantage. But in our system of justice this imbalance is adjusted by the rights of the defendant at trial: (a) that he need not be witness against himself; (b) that he is entitled to a unanimous verdict of his peers; (c) that he cannot be again brought to answer, once acquitted; (d) that he must be found guilty beyond a reasonable doubt. Furthermore, there is no right in the state to appeal and there is no discovery procedure to obtain from the defendant himself the names of witnesses, etc. No one would suggest that these trial protections be altered, but if the pretrial investigation, which must involve interrogation of suspects and witnesses (both of whom could or could not be culprits in the crime), is eliminated, then our system of justice must fail but for a concomitant revision in our form of trial. If the foundation of our system of justice is rocked, something must give way; the consequences may not be what this Court, any lawyer, or any citizen would want.

5.

The "fear" of admonishment is that it will benefit only the recidivist and the professional. The first offender and the Culombes, Fikeses, Haleys, Paynes or Recks will not be the beneficiaries. The innocent will take offense to the caution.

6.

Many of the restrictions upon law enforcement, albeit for the good of the individual, must of necessity greatly burden these men who are charged with the protection of the public. That the police officer is the subject of distrust is evidenced by (a) the detailed information required in affidavits to obtain warrants, (b) the required corroboration of informer information, and (c) the trend to accept the suspect's word over that of the police officer. And so, by establishing unworkable requirements do we not further undermine and demoralize the police officer, forcing him to "stretch the truth"? Consider the experience in England with the Judges' Rules:

> The Rules undoubtedly required the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said, *it is the general habit of the police never to admit to the slightest departure from correctness.* DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 47 (1960). (Emphasis added.)

7.

Exculpatory statements also will not be easy to obtain, thereby inviting defendants to change their minds and perjure themselves on the stand.

8.

Will impossibility of performance force, not only the police to uncover loopholes but the prosecutor and the trial courts as well to pursue this path—objective looking to one side? Trial judges, both state and federal, as well as most appellate courts, in their sympathy with the law enforcement officers' plight, are inclined to encourage law enforcement officers to "avoid" the stringent requirements

of the rules. Is this not apparent in the California District Courts of Appeal application of their *Dorado* rule to those cases not yet considered final? [*E.g.*, RE NO INTERROGATION, *People* v. *Clapper*, 233 A. C. A. 18. 43 Cal. Rptr. 105 (1965), *People* v. *Fork*, 233 A. C. A. 860, 43 Cal. Rptr. 804 (1965); RE HARMLESS ERROR, EXCULPATORY STATEMENTS OR ADMISSIONS, *People* v. *Williams*, 235 A. C. A. 474, 45 Cal. Rptr. 427 (1965) (admitted theft but denied robbery), *People* v. *Cooper*, 234 A. C. A. 699, 44 Cal. Rptr. 483 (1965) (admitted he was chewing marijuana cigarette); RE NO "FOCUS," *People* v. *Jones*, 232 A. C. A. 471, 42 Cal. Rptr. 714 (1965); RE NO "CUSTODY," *People* v. *Garrett*, 235 A. C. A. 155, 44 Cal. Rptr. 897 (1965); RE TYPE OF ADMONISHMENT, *People* v. *Chaney*, 233 A. C. A. 75, 43 Cal. Rptr. 280 (1965).]

C. Confessions Have an Essential Role and They Satisfy a Useful Purpose in the Administration of Justice.

The fact that confessions are used extensively, as shown by the Appendix, may not necessarily demonstrate justification for their presence. Rationalization of all reason is possible. Despite this logic, an outline of a few of the reasons, without great detail as to "why" or "reason" for the "why," may be of assistance to the Court:

1.

Basically, crimes are covert by nature, and, zealous assertions to the contrary, many crimes are impossible to solve without a confession.

2.

Confessions are the prime source of other evidence. Even if it is possible to solve crimes in the "scientific police laboratory" (a misconception often perpetuated by the police themselves), the evidence that is analyzed often must

come from admissions: the existence of the gun and the location thereof, the location of an automobile (e.g., in an assault), etc. The doctrine of the fruit of the poisonous tree will make an inadmissible confession of even greater consequence.

3.

Critics claim the urgent need is for more and better police officers. Reality dictates that although there be the need, there never will be sufficient police officers to prevent incipient crime and to investigate the millions of crimes committed in the United States. The selection of crimes to be investigated merely will be reduced. Assuming the existence of the required unlimited financing, nevertheless there are not enough FBI-caliber men, with college, law school or other advanced training, available or attainable for the cop's beat. Even on that dark hypothesis, which has some remedy by way of actual training, a "college degree per se does not a good police officer make."

4.

There is a direct corollary between pleas of guilty and confessions. The Appendix data so indicates where such data is available. (The City of Baltimore is an exception which has had the experience wherein custom has put aside the jury trial.) This is even more obvious when a distinction is made of the term "confessions" by eliminating therefrom the "exculpatory statement." It has been said that if all defendants pleaded not guilty and demanded trial by jury, justice in the United States would come to an abrupt halt. Can there be any doubt that an increased call upon court and prosecution personnel and facilities, already overtaxed, would adversely affect the administration of justice in the United States? Although all of us advocate justice, whatever the pecuniary cost, idealism

must give way to the reality of an overburdening demand that cannot be (or will not be) absorbed by the economy.

If cases are to be disposed of, heavy reliance will be given to bargaining. Is it the purpose of our system of law to encourage perjury upon the part of the defendant? Is it to allow the natural desire of self-preservation to be expressed by refusal to plead guilty because the confession is determined inadmissible and thus guilt cannot be proved beyond a reasonable doubt? Does such an inducement discourage rehabilitation? Is the purpose of our administration of criminal laws to limit convictions of the guilty?

5.

Typically, Borchard and the Frank studies are cited as authority for the proposition that innocent persons are convicted. BORCHARD, CONVICTING THE INNOCENT (1932); FRANK & FRANK, NOT GUILTY (1957). To say that innocent persons are not convicted is to defy reality.

While every innocent person convicted is a haunting reminder, unfortunately human beings are involved so that no matter what the rule such tragedies will occur. However, the dates of those cases, the number thereof and the infrequent correlation between confession and the wrongful conviction must be taken into consideration. In 29 of the 65 cases reported by Borchard, the innocent person was convicted by eyewitness testimony, all the others being laid to causes other than confessions except in two "notable" instances. In virtually all of the very few cases involving any form of statement, it is unlikely that a *Dorado*-type warning would have been of assistance because of the mental deficiency of the defendant. There may well be in the converse more innocent persons convicted because of lack of a confession.

6.

Juries are reluctant to convict one who has admitted no wrongdoing. A direct correlation between trial and conviction is evident from the Appendix material, not to mention the fact that a plea of not guilty, lacking an admissible confession, often is subject to being dismissed at the discretion of the prosecuting attorney as difficult or impossible to convict.

D. The Judges' Rules and the Dorado Interpretation of Escobedo Cannot Be Equated.

The Judges' Rules of England are cited as a persuasion that the United States should adopt a *Dorado* interpretation of *Escobedo*. The argument is faulty for the following reasons:

1.

Since the time of the formulation of the Judges' Rules in 1912 and continuing up to the present, English police have been able to enforce the laws because their image was such that few would question their authority, whether they had it or not. The English citizen would not think to refuse (or at least in the past would not) the request of the police to come down to the station for investigation purposes. If the officer arrested someone and did not have the authority, no question would be raised. Glanville Williams, the most eminent authority on criminal law in England, has stated: "The law works as well as it does chiefly because the moral authority of the police enables them to get on without powers." Williams, *Demanding Name and Address,* 66 L. Q. Rev. 465, 476 (1950). To some extent this is true in the United States. But then why the rule? So that it can be broken or bent?

2.

Referring to that fact that the fundamental condition of the admissibility of a statement is that it be voluntary, the following statement is made in the introduction to the Rules: "Within that principle the Judges' Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these rules *may* render answers and statements liable to be excluded from evidence in subsequent criminal proceedings." [1964] 1 All. E. R. 237 n. 2). (Emphasis added.)

3.

The admonishment is of the right to remain silent *not* of the right to an attorney: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence" Judges' Rules, Rule 3(a) [1964] 1 All. E. R. 237, 238. In the United States two jurisdictions have followed admonishment practice as to silence, none as to right to an attorney. Uniform Code of Military Justice, 10 U. S. C. § 831; Tex. Code Crim. P. art. 727. Cases of exclusion of a confession on the ground of failure to inform the defendant of his right to counsel are unknown in England. Cross, *Confessions and Cognate Matters: An English View*, 66 Colum. L. Rev. 79, 88 (1966).

4.

While in 1964 the U. S. population was only 4 times that of England and Wales combined, we had approximately 30 times as many murders and nonnegligent manslaughters, 40 times as many forcible rapes, and 35 times as many robberies. See Appendix p. 45a. It should be remembered that this is not a comparison with statistics of prior years,

as has been the attack advanced by the critics, but is upon the statistics of two different countries for the same year.

5.

There is no need for rules of admonishment. The rules on voluntariness as prescribed by the United States Supreme Court are far more restrictive in application than the Judges' Rules and they do provide adequate protection for the innocent. See *Haynes* v. *Washington,* 373 U. S. 503 (1963).

II. AS A NEW STANDARD REVERSING PRIOR DECISIONS OF THIS COURT, ESCOBEDO v. ILLINOIS SHOULD NOT BE ACCORDED RETROSPECTIVE APPLICATION.

The *Escobedo* principle is a new rule, not only as an exclusionary concept but as a constitutional right. *Crooker* v. *California,* 357 U. S. 433 (1958); *Cicenia* v. *Lagay,* 357 U. S. 504 (1958). The same arguments presented by this amicus in *Linkletter* v. *Walker,* 381 U. S. 618 (1965) and *Angelet* v. *Fay,* 381 U. S. 654 (1965), including the supplementary material furnished to the Court therein, apply equally, if not more forcefully to the present situation. Likewise, the decision of *Tehan* v. *Shott,* 34 U. S. L. WEEK 4095 (January 19, 1966), should be applied.

There has been no holding of retroactivity by any of the federal or state appellate courts: to the contrary, the courts that have construed *Escobedo* liberally have held such a rule not to have retrospective application. *E.g., In re Lopez,* 62 Cal. 2d 368, 398 P. 2d 380 (1965).

Obviously the most dangerous of criminals are among those still incarcerated. Lack of other evidence at this late date, if it ever existed, would require the release of many of them. Both *Crooker* and *Cicenia* would be entitled to new trials or release, reversing standings of this Court.

Although the membership of this Court changes, there remains the need for relative stability of established principles. To foster second-guessing will be detrimental to an orderly society and to the administration of justice.

In the matters now before the Court, arguments have raged and will continue this pursuit until this Court finally resolves them. To further this debate be restatement thereof herein will serve no purpose. The difficulties which the California courts are experiencing with the cases which are not as yet "final" (that is, after conviction but in the process of appeal or subject to appeal, the time therefor not having expired) seem reason enough to consider the national effect upon the administration of justice, such as would make the California situation a mere skirmish. To cite all of the cases would be of no value, but to illustrate this point a *few* of the 1965 reversals of murder convictions (where the punishment was death or life imprisonment) on a *Dorado* interpretation of *Escobedo* are: California Supreme Court: *People* v. *Bostick,* 62 Cal. 2d 820, 402 P. 2d 529 (1965) (4 defendants); *People* v. *Davis,* 62 Cal. 2d 791, 402 P. 2d 142 (1965); *People* v. *Roberts,* 63 A. C. 79, 403 P. 2d 411 (1965); *People* v. *Lilliock,* 62 Cal. 2d 618, 401 P. 2d 4 (1965) (2 defendants); District Courts of Appeal: *People* v. *Benavidez,* 233 A. C. A. 346, 43 Cal. Rptr. 577 (1965); *People* v. *Reid,* 233 A. C. A. 184, 43 Cal. Rptr. 379 (1965). There are many others, including Dorado himself and the defendant, Stewart, now before the Court. Of course, these cases are a mere sampling of the overall effect of *Dorado,* much less what the effect would be were it given retroactive application.

The Appendix of this brief demonstrates, far more than any recitation of theories, the possible effect of a decision to make any *Escobedo* rule retroactive. Of course, if the suggestion for an advisory rule is adopted, no problem lies on this point.

As new rules of conduct are formulated by the Court upon new found constitutional principles, the requiring of retrospective application thereof will frustrate the administration of justice beyond comprehension. While courts may be required to exercise hindsight, police officers only can be expected to follow prospective rules.

III. TO GUIDE LAW ENFORCEMENT OFFICERS, AN ADVISORY STANDARD, AS DISTINGUISHED FROM AN EXCLUSIONARY RULE, SHOULD BE DEVISED.

The exclusionary rule is ineffective at best. It may well be harmful. Whether changes can occur, or will occur in a degree that change is possible, devolves around human nature more so than legal principles, except insofar as the latter is an integral part of the former. This is a fact that even the critics of law enforcement appreciate:

> A practical difficulty in enforcing the constitutional rights of prisoners is the small efficacy of sanctions against official misconduct. In practice, the exclusionary rule alone is available, and it has no direct disciplinary force. The rule is applied only at trial, or perhaps only on appeal, months after the case has been "solved" and after the credit for getting the confession has been duly shared by all concerned. Then disappointed officials can ascribe the blame to the state or federal courts. Only after such rare public disclosures as those in the *Whitmore* case will any discredit fall on the officers.
>
> The only effective way to establish a constitutional regime in the administration of criminal justice is for the administrative superiors of police and prosecutors to insist on it. Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21, 40 (1965).

And Professor Sutherland may well have stated that appellate judges are not inclined to reverse many cases for this reason as well. To add an even more unpopular com-

pulsory rule of exclusion will not serve the interests of the people, law-abiding and nonlaw-abiding alike, of whom police officers, prosecuting attorneys, state and federal judges and Justices of this Court are servants.

Has not the time arrived for all of these public servants to join with other members of the executive and legislative branches of government in working together toward improving justice? Can this not be accomplished by an advisory rule which provides for reasonable, workable requirements but which does not exclude from court, on the bases of technicalities, the evidence obtained by a police officer attempting in good faith to follow such a rule? There should be no cause for "stretching of the law" (if not of the imagination) by the police officer or the trial or appellate judge, in order to uphold a conviction which should be so upheld but for an unintentional violation of such rule by a police officer seeking to perform his duty. The Advance Sheets readily disclose the means used by the California District Courts of Appeal to evade the stringent *Dorado* rule. What course the police and the trial judges of that state may be pursuing is not known.

Would not the advised use of an exclusionary rule—if limited to the flagrant abuse, the obvious violation or the grossly negligent failure to abide with such a regulation—bring, more forcefully, any improper conduct to the attention of those who are in a position to discipline the recalcitrant? Thus, it would be possible to inaugurate a workable system of redress.

State and federal governments are engaged, at last, in asserting positive action toward the objective of effective and just administration of the criminal law. The needs are obvious, although in all instances the method to accomplish the specific need is not. Surely improvement of the judiciary, the prosecutorial office and the various law enforcement bodies can be made and will be made because of

the present awareness. The various federal programs are to be seen in the presidential message of March 8, 1965, the immediate products being the Law Enforcement Assistance Act and the National Crime Commission. Local governments and private associations, from state to city, are involved in the overall plan. The American Bar Association is now engaged in studies which plan uniformity of trial practices as a means to more efficient justice (Criminal Justice Project headed by Chief Judge J. Edward Lumbard, United States Court of Appeals for the Second Circuit). The International Association of Chiefs of Police, this amicus and other national groups who represent administrators of the criminal laws seek to make changes for the better. There is a revolution in sight. Through the leadership of this Court, much of this promotion has come to fruition.

Fifty states, which are much like fifty countries, with their history of politics, the cultural differences of their ethnic groups and the myriad of other factors which have made them distinct, cannot be welded into a uniform mass overnight. With a national credo, uniformity in administration should be sought insofar as it can be sought. Of course, with human beings in charge perfection can only be a goal. This is not a pessimistic outlook, but rather it is optimistic that such a goal should be set at all.

But, to place, before all else, the opinion that the change must occur immediately by way of a dogmatic exclusionary rule may well frustrate the hoped-for objectives. The exigencies are time and study. The standard of justice in this country is not such that we cannot afford to stay changes, if the foreseeable results are more productive. An advisory rule, in the manner of *Wolf* v. *Colorado*, 338 U. S. 25 (1949) (which, because the times were different, did not precipitate the action warranted), will certainly be heeded now. It will give time to implement and still lead the way.

As we have throughout our entire legal history, we can look to England for the wisdom of experience. There, the formation of the Judges' Rules came at the request of police officers for guidance. While, as has been previously noted, the police of that country do not always adhere to the letter, the Rules are effectual because of the unique rapport between the courts and the police, an example to be encouraged in this country. The advisory Judges' Rules have some workable qualities which would not frustrate the enforcement of our laws. The indulgence of the Court in this suggestion is respectfully requested.

CONCLUSION.

Amicus curiae requests that the Court limit *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), to its facts and that the rule in *Escobedo* be prospective only, in the form of an advisory rule to guide the administrators of our criminal laws.

For these reasons the decision in *California* v. *Stewart* should be reversed and the decisions in *Miranda* v. *Arizona*, *Vignera* v. *New York* and *Johnson* v. *New Jersey* should be affirmed.

Respectfully submitted,

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PROSECUTING ATTORNEYS CONTRIBUTING DATA.

Alameda County, Oakland, California
J. Frank Coakley, District Attorney
Robert H. McCreary, Assistant District Attorney

Sacramento County, Sacramento, California
John M. Price, District Attorney

Hartford County, Hartford, Connecticut
John D. LaBelle, State's Attorney

Eleventh Judicial District (Dade County), Miami, Florida
Richard E. Gerstein, State's Attorney

Atlanta Judicial Circuit (Fulton County), Atlanta, Georgia
Lewis R. Slaton, Solicitor General

Orleans Parish, New Orleans, Louisiana
Jim Garrison, District Attorney
Charles R. Ward, Chief Assistant District Attorney

City of Baltimore, Baltimore, Maryland
Charles E. Moylan, Jr., State's Attorney
John D. Hackett, Assistant State's Attorney

Wayne County, Detroit, Michigan
Samuel H. Olsen, Prosecuting Attorney
Samuel J. Torina, Assistant Prosecuting Attorney

Hennepin County, Minneapolis, Minnesota
George M. Scott, County Attorney
Donald J. Omodt, Assistant County Attorney

Douglas County, Omaha, Nebraska
Donald L. Knowles, County Attorney

Essex County, Newark, New Jersey
Brendan T. Byrne, County Prosecutor
Barry H. Evenchick, Assistant County Prosecutor

Kings County, Brooklyn, New York
Aaron Koota, District Attorney
Elliott Golden, Chief Assistant District Attorney
Ronald B. Bianchi, Assistant District Attorney

Nassau County, Mineola, New York
William Cahn, District Attorney

New York County, New York, New York
Frank S. Hogan, District Attorney
David S. Worgan, Assistant District Attorney

Westchester County, White Plains, New York
Leonard Rubenfeld, District Attorney
Thomas A. Facelle, Jr., Senior Assistant District Attorney

Franklin County, Columbus, Ohio
C. Howard Johnson, Prosecuting Attorney

Hamilton County, Cincinnati, Ohio
Melvin G. Rueger, Prosecuting Attorney

Montgomery County, Dayton, Ohio
Lee C. Falke, Prosecuting Attorney
Walter H. Rice, Assistant Prosecuting Attorney

Philadelphia County, Philadelphia, Pennsylvania
James C. Crumlish, Jr., District Attorney
(to 12/31/65)
Arlen Spector, District Attorney
(effective 1/1/66)
Richard A. Sprague, Assistant District Attorney

INTRODUCTION.

This Appendix contains charts showing facts, figures and relative percentages for individual jurisdictions and on a national scale in regard to confessions and criminal cases. In most instances the data collected was sent in affidavit form with some additional information by letter. The original materials, that is, request for data forms, the affidavits (which have been condensed and correlated for this presentation) and other information received have been filed with the Clerk of the Supreme Court.

Realizing that a great many of the opinions on the relative significance of confessions (statements) to the process of criminal cases have been based upon supposition rather than fact, the National District Attorneys Association in October 1965 requested the cooperation of metropolitan prosecuting attorneys to search files and records to ascertain the actual use of confessions in felony cases. Those listed herein responded to the request. The year 1961 was selected for uniformity. To give an insight into the number of felony defendants who might still be incarcerated (having been convicted at trial as distinguished from entering a plea of guilty) and thus have possible recourse if retroactive application were found, case summaries were requested. Those jurisdictions who had sufficient time provided this information and it is included herein. Data from those jurisdictions that did not fit into the format requested for the year 1961 are part of the dossier of original data filed with the Clerk of the Supreme Court.

Generally, the data was obtained by assistants in the prosecuting attorney's office, although in one instance law students were employed for this purpose and in others, police officers or other law enforcement personnel collected the data or otherwise assisted in its compilation.

At first a request was made to check each case. This was done in a number of the offices; but because of lack of time and personnel, other offices asked to make samplings. All variations in the method of data collection are noted.

Many difficulties were encountered due to insufficient information in the records. In Miami, Oakland and Baltimore, through the use of samplings, such limitation in data was noted. Presumably this was true in other jurisdictions as well, so that the ratio of the number of cases involving confessions, as reported herein, would be low.

In some jurisdictions special data was reported. For example, both Minneapolis and Detroit classified their data into types of crimes. Also the Minneapolis data was further anaylzed to distinguish exculpatory statements from admissions of guilt, to show use in trials, pleas of guilty, etc. Miami included information on confessions in homicide cases.

Usually opinion is involved as to the essentiality of confessions at trial or plea proceedings. Therefore, the request for data excluded the reporting of such information, although it may be readily deduced from some of the abstracts. However, generally it would be conceded that the "confession" was a factor in the cases—whether in obtaining a plea of guilty or in the conviction at trial. The latter situation would include the use of exculpatory statements for impeachment purposes or otherwise aid in the trial. The fact that statements may have been used to secure evidence of the crime would preclude the determination of whether it was "essential" to conviction.

No comment is made on the data, allowing the facts and figures to speak for themselves. The data was collected, compiled and included in this brief for the assistance of the Court. The only other data of this type known is that

found in the supplementary memorandum to this Court submitted by this amicus in *Linkletter* v. *Walker:* in a table of 100 defendants, 85 gave statements.

GLOSSARY.

(Terms Used in Tables and Original Data.)

Confessions: extrajudicial statements of all kinds, admissions or exculpatory, oral or written.

Convictions: pleas of guilty and convictions at trial.

Dispositions: pleas of guilty, trials, nolle prosequi, dismissals, etc.—where case file is closed.

Pleas of Guilty: convictions without trial verdict or judgment; includes cases where defendant pleaded guilty after trial commenced.

Prosecutions: pleas of guilty and trials by judge or jury.

Trials: acquittals, verdicts, findings, dismissals by court, insanity, etc.

Trial Convictions: verdicts of guilty by jury and/or findings of guilty by judge sitting without jury after trial on the facts.

TABLE I.

CONFESSIONS: NATIONAL RELEVANCE
REVIEW OF ALL 1961 CASES.

Jurisdiction	Confessions/ Pleas Of Guilty	Confessions/ Trial Convictions	Confessions/ Trials	Confessions/ Convictions	Confessions/ Prosecutions	Confessions/ Dispositions
California, Sacramento County (Sacramento)	45.3% (351/774)	64.7% (55/88)	57% (63/110)	47% (406/859)	46.9% (414/884)	—
Florida, Eleventh Judicial Circuit[1] (Dade County, Miami)	—	—	—	43.5% (750/1722)	—	35.8% (791/2206)
Maryland, City of Baltimore[1]	29% (61/210)	37% (112/300)	32% (137/428)	33.9% (173/510)	30.9% (198/638)	—
Michigan, Wayne County (Detroit)	—	—	—	—	60.8% (879/1445)	—
New York, Westchester County (White Plains)	84.6% (608/718)	71% (5/7)	80% (8/10)	82% (613/725)	84.7% (616/728)	83.8% (622/742)
Ohio, Hamilton County (Cincinnati)	—	—	—	—	—	64.4% (667/1035)
Ohio, Franklin County (Columbus)	—	—	—	82% (731/891)	—	—
Ohio, Montgomery County (Dayton)	76.8% (483/629)	43.3% (13/30)	38% (19/50)	75% (496/659)	73.8% (502/680)	—

Note: Figures in brackets refer to number of cases which have a record of confessions over the number of case files examined which equals the percentage given in each category.

1. It is clear that the records in these jurisdictions are not complete, in that in many instances the record did not indicate whether a confession (statement) was involved or not.

REVIEW OF 1961 CASES BASED PARTLY UPON SAMPLING

Jurisdiction	Confessions/ Pleas Of Guilty	Confessions/ Trial Convictions	Confessions/ Trials	Confessions/ Convictions	Confessions/ Prosecutions	Confessions/ Dispositions
California, Alameda County[1] (Oakland)	60% (21/35)	—	—	—	—	—
Connecticut, Hartford County[2] (Hartford)	53.8% (7/13)	9.5% (2/21)	—	—	—	—
Georgia, Atlanta Judicial Circuit[3] (Fulton County, Atlanta)	52.7% (69/131)	—	—	—	47% (71/150)	—
Louisiana, Parish of Orleans[4] (New Orleans)	78.4% (22/28)	—	47.8% (22/46)	—	—	—
Minnesota, Hennepin County[5] (Minneapolis)	86.7% (26/30)	80.7% (21/26)	80% (28/35)	—	—	—
New Jersey, Essex County[6] (Newark)	93% (55/59)	62% (18/29)	53.6% (22/41)	82.9% (73/88)	77% (77/100)	—
New York, Kings County[7] (Brooklyn)	47% (51/108)	0% (0/8)	11.8% (2/17)	44% (51/116)	42.4% (53/125)	—
New York, New York County[8] (New York)	50% (139/277)	24.4% (23/94)	19% (23/120)	—	—	—
Pennsylvania, Philadelphia County[6] (Philadelphia)	—	—	—	50% (189/376)	—	—

Note: Figures in brackets refer to number of cases which have a record of confessions over the number of case files examined which equals the percentage given in each category.

1. Examination of every 25th case.
2. Pleas of Guilty—examination of every 25th case; Trials—all cases checked.
3. Sampling of 10% of all cases prosecuted.
4. Pleas of Guilty—examination of every 25th case; Trials—all cases checked.
5. Pleas of Guilty—sampling of 1 out of 20 cases; Trials—sampling of 35 cases of 65 cases tried.
6. Based on random sampling of 100 cases.
7. Every 25th case checked.
8. Pleas of Guilty—review of every 25th case where pleas came before trial and of all pleas given after trial had commenced: Trials—review of all cases.

TABLE III.

CONFESSIONS: NATIONAL RELEVANCE OF PLEAS AND TRIALS—1961.

COMBINED TABLE—DATA OBTAINED BY COMPLETE CHECK OR BY SAMPLING.

Jurisdiction	Confessions/ Pleas of Guilty	Confessions/ Trial Convictions	Confessions/ Trials
California, Sacramento County (Sacramento)	45.3%	64.7%	57%
Maryland, City of Baltimore	29%	37%	32%
Minnesota, Hennepin County (Minneapolis)	86.7%	80.7%	80%
New Jersey, Essex County (Newark)	93%	62%	53.6%
New York, Kings County (Brooklyn)	47%	0%	11.8%
New York, New York County (New York)	50%	24.4%	19%
New York, Westchester County (White Plains)	84.6%	71%	80%
Ohio, Montgomery County (Dayton)	76.8%	43.3%	38%

Note: California, Maryland, New York (Westchester County), and Ohio based upon review of all cases. New York (New York County)—trial convictions and trials based upon review of all cases. All other percentages based upon sampling.

California.

ALAMEDA COUNTY, Oakland
J. Frank Coakley, District Attorney

Data compiled by Robert H. McCreary,
Assistant District Attorney

1960 County Population: 908,209

In "Crime in California," 1961, as compiled in the State's Bureau of Criminal Statistics, the figures for the County of Alameda were: felony filings on defendants—1258; felony defendants—1304; convicted—1229; pleaded guilty—1043.

Examining the Registers of Criminal Actions for the County (County Clerk No. 32134 to and including County Clerk No. 33271) for the year 1961, Mr. McCreary found 888 cases in which guilty pleas were entered. Of the 888 cases, every 25th case was reviewed for a total of 35 cases specifically considered. The check of these cases revealed that extrajudicial confessions were involved in 21 cases; no extrajudicial confessions were involved in 11 cases; no data was available on the confession issue in 3 cases. Thus, 60% of the cases wherein pleas of guilty were registered also contained verifiable extrajudicial confessions.

No data was to be had in the records or files concerning the use or nonuse of confessions at trial, except in the very few cases where appeal transcripts were prepared.

California.

SACRAMENTO COUNTY, Sacramento
John M. Price, District Attorney

Data compiled under the direction of
John M. Price, District Attorney

1960 County Population: 502,778

1961: 884 FELONY PROSECUTIONS
Based on a Review of All Felony Prosecutions

		Pleas of Guilty	Trials[1]	Total
Convictions		774	85	859
Confessions		351	55[2]	406
Relativity:	Confessions / Convictions	45.3%	64.7%	47%
Relativity:	Confessions 414 / Prosecutions 884	—	—	46.9%
Relativity:	Confessions 63 / Trials 110	—	57%	—

1. Total tried: 110.
2. Total confessions involved in 110 trials: 63, of which 3 found not guilty by reason of insanity.

In 1961 there were 965 felony dispositions, but no data was available on confessions in the total dispositions other than by trials or pleas of guilty (e. g., nolle prosequi).

There remain under the control of the penal authorities 15 defendants who were convicted at trials (as distinguished from pleas of guilty) in which their statements were a factor. Resumes of these cases are as follows:

Superior Court #24754—James Vienni:

Convicted of three counts of armed robbery after trial by jury. An exculpatory-type statement was used at trial to impeach defendant as it varied from his sworn testimony. Conviction was the result of a combination of circumstances: (1) Identification of defendant by four eyewitnesses; (2) Fact defendant had prior felony convictions; (3) Use of district attorney's statement as impeachment.

Superior Court #25294—William Henry Houghton, age 35:

Convicted of assault with intent to commit murder, armed robbery and ex-convict with a gun. Sentenced January 17, 1962; all counts consecutive, and adjudged a habitual criminal. Defendant asked three people to accompany him in a holdup, showed them the gun he intended to use and testified for them; each refused. When arrested defendant made statement that he is fighting for 15 to 20 years of his life—that he had no one to blame but himself, that he was willing to pay for his actions and that he knew he had to.

Superior Court #25356—Robert O. Dingman, age 29:

Convicted of two counts of second-degree burglary. Sentenced to state prison on February 16, 1962. Defendant did not take the stand; however, his confession was introduced against him.

Superior Court #25301—Ervin Lewis Zander, age 19:

Defendant, in conjunction with two others who pleaded guilty, committed an armed robbery. He pleaded not guilty, was convicted on January 30, 1962, and sentenced to California Youth Authority on February 21, 1962. His confession was used against him at trial.

Superior Court #25326—Arthur Davis, age 55:

Convicted of first-degree robbery. Charged November 21, 1961; jury trial; sentenced to state prison February 14, 1962. Defendant, an on-duty policeman in a small town, was look-out while Freeman and DeLouize robbed bar. During investigation Freeman confessed, naming Davis. Had suspicion focused on Davis? By use of electronic device (. . .), made recording of damaging admissions by Davis relative to his part in robbery. This statement vital to conviction as corroboration of Freeman's testimony. Davis now on parole.

Superior Court #25047—Sidney Lewis, age 39:

Convicted of burglary, second; sentenced to one to 15 years on September 27, 1961; affirmed on appeal. No eyewitnesses. Defendant walked into the Los Angeles Sheriff's office and confessed the crime to two officers. Confession used as only means of connecting him to crime. Defendant admitting smashing a jewelry store window and stealing miscellaneous jewelry.

Superior Court #24935—Kenton Dale McHenry, age 32:

Convicted of four counts of incest and one count of lewd and lascivious conduct with a child under the age of 14; sentenced to one to 50 years on each count of incest and one year to life on the child molest. Two eyewitnesses. Admission that one day his wife "came home too soon" was closest thing to a confession in the case. Sentence was imposed August 11, 1961.

Superior Court #24918—Joseph C. Davis, age 34:

Convicted of first-degree robbery; sentenced to five years to life on August 23, 1961. Eyewitnesses, plus defendant confessed to aiding and abetting in the robbery of a service station attendant.

Superior Court #25177—Martha Seach, age 37:

Convicted of attempted burglary, placed on felony probation. No confessions or admissions, but demonstrably false and evasive self-exculpatory statements were introduced against her.

Superior Court #25176—Billy Tildon Brown, age 27:

Convicted of forcible rape; sentenced to three years to life on November 29, 1961. No confession or admissions, but formal statement used to impeach defendant on basis of prior inconsistent statements as to whereabouts at particular times.

Superior Court #25373—William J. Songs, age 49:

Convicted by jury of robbery, first degree, on February 9, 1962. Sentenced to state prison for five years to life on March 1, 1962. Convicted on testimony of eyewitness-victim. Made statement denying crime. Defendant's testimony at trial was, in several material respects, inconsistent with his statement. Statement was, therefore, used on cross-examination of defendant for impeachment.

Superior Court #25415—Jesse Allen, age 48:

Convicted by jury of murder, second degree, on March 14, 1962. Sentenced to state prison for five years to life on March 19, 1962. Made statement confessing shooting an acquaintance in the course of an argument in a pool hall. Convicted upon eyewitness testimony and confession.

Superior Court #25034—Harold Pearl, age 33:

Convicted by jury October 26, 1961, of murder, second degree, and abortion. Sentenced to state prison on November 7, 1961, for five years to life and six months to five years concurrent. There were no eyewitnesses to the

crimes, and defendant was convicted solely on circumstantial evidence. He gave an extrajudicial statement denying involvement. This statement contained demonstrably false statements plus admissions showing a consciousness of guilt. Defendant declined to testify in his own behalf because of probability of damaging cross-examination on the basis of his extrajudicial statement.

Superior Court #25034—Robert Kennedy, age 41:

Convicted by jury October 26, 1961, of murder, second degree, and abortion. Sentenced to state prison on November 7, 1961, for five years to life and six months to five years concurrent. There were no eyewitnesses to the crimes, and defendant was convicted solely on circumstantial evidence. He gave an extrajudicial statement denying involvement. This statement contained demonstrably false statements plus admissions showing a consciousness of guilt. Defendant declined to testify in his own behalf because of probability of damaging cross-examination on the basis of his extrajudicial statement.

Superior Court #24438—Edward Potter, age 34:

Convicted by jury of lewd and lascivious conduct with a child under the age of 14 years (violation of Section 288 of the Penal Code). On January 6, 1961, he was convicted and on January 27, 1961, sentenced to the state prison for a term of one year to life. Defendant convicted on testimony of the victim, age 13, plus his extrajudicial confession.

Connecticut.

HARTFORD COUNTY, Hartford
John D. LaBelle, State's Attorney

Data compiled by John D. LaBelle,
State's Attorney

1960 County Population: 689,555

There were 593 defendants docketed on felony charges for the calendar year 1961.

1961: 319 PROSECUTIONS.

Based on Sampling of Pleas of Guilty and Review of All Trials.

	Pleas of Guilty	Trials[1]
Convictions	13	21
Confessions	7	2
Relativity: Confessions / Convictions	53.8%[2]	9.5%

1. Total tried 33 of which 21 were convicted; 6 were acquitted; 4 were found not guilty by reason of insanity and committed to state mental institution; 2 were found guilty of lesser charges.

2. Based on an examination of approximately every 25th case, for a total of 13 files checked. A review of these files disclosed that in 7 cases extrajudicial confessions had been made by the defendants.

There remain under the control of penal authorities 15 of the defendants convicted (by plea or trial) of felonies. Of the defendants so incarcerated, 8 of them confessed. Since all eight of these cases involved pleas of guilty, resumes thereof are not set out here.

Florida.

ELEVENTH JUDICIAL CIRCUIT, Miami
Richard E. Gerstein, State Attorney

Data compiled under the direction of
Richard E. Gerstein, State Attorney

1960 Judicial Circuit Population: 935,047
(Dade County)

The files were reviewed and the data correlated by Denis Dean and Philip S. Goldin, law students at the University of Miami School of Law, who were retained for that purpose by Mr. Gerstein.

In the calendar year 1961, there were 2206 felony charges filed. Defendants convicted for the period numbered 1722, which count includes felonies reduced to misdemeanors; pleas of guilty totaled 1294. The difference between convictions and pleas is attributed primarily to the inclusion of felonies reduced to misdemeanors (especially automobile thefts) in the total conviction count; no specific check was made to reflect this misdemeanor-conviction figure. No information was reported of cases tried.

An extrajudicial confession was a factor in 791 felonies. Confessions were involved in 750 of the convictions; again the conviction figure incorporates felonies reduced to misdemeanors; also no attempt was made to further classify as to guilty plea or trial. However, in a check of 25 files (approximately every 25th case) wherein the defendant had entered a plea of guilty, it was determined that no evidence of a confession appeared in 17 of these cases while in 8 of these cases no specific data was available regarding the existence or nonexistence of a confession. Thus, from a consideration of this sampling, it can be assumed

that a substantial number of the total cases filed did not contain a record indicating the use or nonuse of a confession; consequently, the percentage of confessions to convictions, 43.5% (750/1722), is low for it is very likely to be considerably higher in view of the sampling. The ratio of confessions to dispositions, 35.8% (791/2206), also is low for the very same reason.

Of those convicted in 1961, 73 remain incarcerated.

1961: 24 Homicide Prosecutions

Based on Review of All Cases Prosecuted

	Pleas of Guilty	Trials[1]	Total
Convictions	20	3	23
Confessions	—	—	21
Relatively: Confessions / Convictions	—	—	91%
Relativity: Confessions / Prosecutions	—	—	87.5%

1. Total tried: 4.

Georgia.

ATLANTA JUDICIAL CIRCUIT, Atlanta
Lewis R. Slaton, Solicitor General

Data compiled under the direction of
Lewis R. Slaton, Solicitor General

1960 Judicial Circuit Population: 556,326
(Fulton County)

A sampling of 10% of the following cases for the year 1961 were taken:

Number of felony cases handled:		1502
Number of pleas of guilty	1146	
Number of cases tried (all jury)	211	
Others (nolle prosequi, dead docket, etc.)	145	

1961: 1357 FELONY PROSECUTIONS

Sampling of 10% of All Cases Prosecuted[1]

	Pleas of Guilty	Jury Trials	Total
Convictions	131	—	—
Confessions	69	2	71
Relativity: $\frac{\text{Confessions}}{\text{Convictions}}$	52.67%	—	—
Relativity: $\frac{\text{Confessions } 71}{\text{Prosecutions } 150}$	—	—	47%

1. Cases reviewed: 131 pleas of guilty; 19 trials.

Louisiana.

ORLEANS PARISH, New Orleans
Jim Garrison, District Attorney

Data compiled by Charles R. Ward,
Chief Assistant District Attorney

1960 County Population: 627,525

Information regarding the total number of felonies disposed of in 1961 is unavailable.

However, there were 700 pleas of guilty entered, and a check of every 25th case (for a total of 28 cases) indicated that 22 extrajudicial confessions were involved while in 6 cases there were no confessions. From this sampling, the percentage of confessions in pleas of guilty equals 78.4%.

There were 46 cases tried before a jury: confessions were used in 22 of these cases; all 22 cases resulted in convictions. The percentage of confessions to trials equals 47.8%. No other data was available.

Maryland.

City of Baltimore
Charles E. Moylan, Jr., State's Attorney

Data compiled by John D. Hackett,
Assistant State's Attorney
1960 City Population: 939,024

Maryland, a common law state, lists many statutory felonies of other jurisdictions as misdemeanors, e.g., daytime and store house burglaries, both of which comprise a sizeable number of indictments in the City of Baltimore. Also many felony charges result in misdemeanor convictions under multiple-type indictments. Consequently, the separation of felonies and misdemeanors in the State of Maryland cannot afford a meaningful comparison with these classifications as employed in other states. In a number of files the records do not indicate whether a confession was used or not, as reflected by a sampling set out in the original data.

In Baltimore the guilty plea is infrequent; likewise, the jury trial is notably rare. Hearings are almost exclusively by the bench: it is possible for as many as four or five cases to be disposed of in one day by one judge and by one prosecuting attorney. The experience of the State's Attorney has been that the small number of guilty pleas have resulted from defense counsels' concern with defendants' stock claim in their petitions that counsel was "professionally incompetent."

1961: 638 Felony Prosecutions

Based on Review of All Felony Prosecutions

			Pleas of Guilty	Trials	Total
Convictions			210	300	510
Confessions			61	112	173
Relativity:	Confessions / Convictions		29%	37%	33.9%
Relativity:	Confessions / Prosecutions	198 / 638	—	—	30.9%
Relativity:	Confessions / Trials	137 / 428	—	32%	—

Defendants still incarcerated where confessions were used in their cases number 33.

Resumes of every 25th case of the 198 cases tried in which confessions were used (for a review of 8 cases) follow (cases selected reflect defendants still incarcerated which fall closest to the actual 25th case):

1. Case No. 682, William Holmes, then age 49, convicted of murder in the first degree, court trial, court appointed attorney, on December 18, 1961 (companion conviction for rape, sentence suspended). Sentenced to life imprisonment on January 5, 1962. No appeal taken. No eyewitness. Confession admits sexual intercourse, binding and gagging of victim, abandoning victim behind locked door, and returning in week's time to find the victim dead. Psychiatric examination completed pre-trial: diagnosis:—legally sane then, legally sane at time of trial.
2. Case No. 1535, Sylvester Alphonse Evans, then age 18, convicted of murder in the first degree on October 24, 1961, court trial, court-appointed attorney.

Sentenced to life imprisonment on March 16, 1962 in the Maryland Penitentiary. Motion for new trial, other court-appointed attorney, heard, denied. Appeal not taken. Defendant identified during trial. Confession admits joining group of youths in pool room, leaving en masse to punish others for "messing" with his sister, a confrontation of sister and victim, age 14, in front of ten friends and beating of victim by group. Confession also admits taking shot gun, on the following night to a "rumble" with victim's friends, chasing the victim and shooting as he fled down the alley. Defendant also admits an immediate change of clothing to avoid police detection.

3. Case No. 1031, Floyd Jorstad, then age 34, convicted on April 7, 1961, after pleading guilty to armed robbery of $2863.00 from bank teller, refused court appointed counsel. Sentenced to nine years in the Maryland Penitentiary on April 7, 1961. Four eyewitnesses identified defendant in police lineup and trial. Statement admitted, contains story of arrival in Baltimore City via freight car to study historical monuments, and makes no reference to bank hold up.

4. Case No. 2165, Paul D. King, then age 45, convicted of second degree murder on September 25, 1961, after entering guilty plea with retained attorney. Sentenced to 18 years in the Maryland Penitentiary on September 25, 1961. No appeal taken. Pre-trial psychiatric report: diagnosis—legally sane. One eyewitness identified defendant at trial. Confession admits slapping, chasing and shooting victim following argument in victim's home after evening date refusal. Defendant, a

longshoreman, also admitted carrying unlicensed gun at all times.

5. Case No. 2652, Emory McNeal, then age 37, convicted on August 9, 1961, of armed robbery, court trial, court-appointed attorney. Electroencephalograph studies ordered by court: diagnosis—no brain injury. Sentenced to 10 years in the Maryland Penitentiary on August 9, 1961. No appeal taken. Both cab driver victims identified defendant at trial. One confession admits hold up in attempt to get money for drink. Other confession admits drinking and "amnesia" concerning possession of leather pocket watch of victim.

6. Case No. 4080, James D. Clay, then age 27, convicted on December 11, 1961 of two cases of armed robbery and assault, court trial, court-appointed counsel, guilty plea. Sentenced to 20 years in the Maryland Penitentiary on December 11, 1961. No appeal taken. Both victims identified defendant at trial. The one confession admits planning with another and execution of robbery of one victim, a used-car office. Denial of weapon used with admission of hand in pocket and death threat. Other confession admits planning with two others, execution of robbery and beating of barber who resisted hold up trip.

7. Case No. 442, Matthew Forrester, then age 26, convicted on January 17, 1962 of mayhem and assault to rob, court trial, court-appointed attorney. Sentenced to ten years in the Maryland Penitentiary, after denial of motion for new trial, by another court-appointed attorney, on June 7, 1962. No appeal taken. Victim, who lost an eye and is deaf, identified defendant as one of four men who as-

saulted him, ripped off his trousers and fled scene with victim's money. Statement asserts defendant only offered victim handkerchief to stop face bleeding and carrying victim into tavern wash room, admits sharing loot taken from victim.

8. Case No. 4793, William Cole, then age 22, convicted on January 24, 1962, of armed robbery, court-appointed counsel. Sentenced to ten years in the Maryland Penitentiary on January 24, 1962. No appeal taken. Truck driver victim identified defendant on street at time of arrest and at trial. Confession admits planning with codefendant to "get some money", agreement to rob truck driver, concealed "gun" in coat pocket, beating of victim, flight and chase by police cruiser and admission of lies to conceal identity when first questioned.

Michigan.

WAYNE COUNTY, Detroit

Samuel H. Olsen, Prosecuting Attorney

Data compiled under the direction of Samuel J. Torina, Chief Appellate Attorney, by the Criminal Investigation Division, Detroit Police Department

1960 County Population: 2,666,297

1961: 1445 PROSECUTIONS.

Crime	Prosecution	Conviction	Confession	Relativity: Confession/ Prosecution
Unlawful driving away auto and possession of stolen auto	392	270	233	52%
Uttering & publishing; larceny over $100 (shoplifting)	337	331	241	71.5%
Homicide	115	105	61	53%
Narcotic violations	240	197	124	51.7%
Kidnapping, extortion, arson, larceny by trick	24	9	7	29%
Robbery	181	170	148	81.7%
Burglary	62	60	40	64.5%
Forcible rape	74	56	18	24%
Carrying concealed weapon; possession of burglar tools; receiving and concealing stolen property over $100	20	18	7	35%
Total	1445	1216	879	60.8%

Minnesota.

HENNEPIN COUNTY, Minneapolis
George M. Scott, County Attorney

Data compiled by Donald J. Omodt, Assistant County Attorney with the assistance of Charles Rogers, Investigative Clerk, County Attorney's Office

1960 County Population: 842,854

In 1961, felony dispositions totaled 658. There were 593 pleas of guilty entered; in a sampling of 1 out of 20 cases (30 cases checked), the ratio of confessions to convictions was 86.7%. A total of 65 cases were tried: 50 convictions and 14 acquittals. A sampling of 35 of these cases revealed a confession to conviction ratio of 80.7% and a confession to prosecution ratio of 80%.

The following two charts disclose the detail of the samplings:

PLEAS OF GUILTY.

Type of Crime	Cases	Signed Confession	Oral Confession	Exculpatory Statement	Defendant Stood Silent	Defendant Still Incarcerated
Robbery	12	9		1	2	5
Rape	1	1				1
Narcotics	3	3				0
Assault	2	1	1			0
Indecent Assault	1				1	0
Murder	3	3				2
Sodomy	3	2		1		0
Carnal Knowledge	2	1			1	1
Arson	1	1				1
Abortion	2	1		1		0
	30	22	1	3	4	10

TRIALS—COURT OR JURY

Type of Crime	Number of Trials	Found Guilty by Court or Jury	Acquitted	Signed Confession	Oral Confession	Exculpatory Statement	Defendant Stood Silent	Totals	Defendant still Incarcerated
Robbery	3	3		*1/0		2/0		3/0	2
Grand Larceny	5	4	1	1/0	1/1	1/0	1/0	4/1	0
Forgery	4	4		1/0	1/0		2/0	4/0	0
Using Auto	2	1	1			1/1		1/1	1
Swindling	1	1				1/0		1/0	0
Burglary	9	5	4	0/1	0/1	4/1	1/1	5/4	3
Rape	5	5		1/0	1/0	3/0		5/0	1
Narcotics	1	1			1/0			1/0	0
Assault	1		1	0/1				0/1	0
Insufficient Fund Checks	1	1					1/0	1/0	0
Criminal Negligence	1	1			1/0			1/0	0
Indecent Assault	1		1			0/1		0/1	0
Bribery	1		1				0/1	0/1	0
	35	26	9	4/2	5/2	12/3	5/2	26/9	7

* Above the slanted line indicates "of the number found guilty"; below the slanted lines indicates "of the number acquitted."

New Jersey.

ESSEX COUNTY, Newark
Brendan T. Byrne, County Prosecutor

Data compiled under the direction of Barry H. Evenchick, Assistant County Prosecutor by Charles H. Acocella, County Investigator and Evan E. Miles, County Detective, both on the staff of the County Prosecutor

1960 County Population: 923,545

1961: SAMPLING OF 100 CASES

			Pleas of Guilty	Trials	Total
Convictions			59	29	88
Confessions			55	18	73
Relativity:	Confessions / Convictions		93%	62%	82.9%
Relativity:	Confessions / Prosecutions	77 / 100	—	—	77%
Relativity:	Confessions / Trials	22 / 41	—	—	53.6%

A chart detailing the review of each individual case is filed in the Office of the Clerk of the Supreme Court.

New York.

KINGS COUNTY, Brooklyn

Aaron E. Koota, District Attorney

Data compiled under the direction of Elliott Golden, Chief Assistant District Attorney, by Ronald B. Bianchi, Assistant District Attorney

1960 County Population: 2,627,319

Number of felony dispositions in 1961:		3334
Number of defendants convicted	2890	
Number of pleas of guilty	2695	
Number of trials (195 convictions; 217 acquittals)	412	

1961: 3107 FELONY PROSECUTIONS

Based Upon Sampling of Every 25th Case

		Pleas of Guilty	Trials	Total
Convictions		108	8	116
Confessions		51	0	51
Relativity: Confessions / Convictions		47%	0%	44%
Relativity: Confessions / Prosecutions	53 / 125	—	—	42.4%
Relativity: Confessions / Trials	2 / 17	—	—	11.8%

Of the 108 pleas of guilty, the records indicated 51 confessions, 43 no confessions, 14 no data available. This again shows that the percentage of confessions is low because it is probable that in some of the cases wherein no data was available confessions were involved. In the 8 trial convictions, the files showed 7 without a confession and 1 with

no data. Of the 9 trial acquittals, the records indicated no confessions in 7 cases and 2 cases with confessions. It is interesting to note that in the 2 cases tried involving confessions (statements) there were acquittals. In at least 7 of the 8 convictions there were eyewitnesses but no confessions.

New York.

NEW YORK COUNTY, New York
Frank S. Hogan, District Attorney

Data compiled under the direction of David S. Worgan, Executive Assistant District Attorney, by Criminal Law Investigators on the staff of the District Attorney

1960 County Population: 1,698,281

The files were reviewed and the data correlated by John G. Guyet, David H. Lamson, Robert D. Mac Lachlon, Jr. and Jay Harris, Criminal Law Investigators, Office of the New York County District Attorney.

1961: 4191 FELONY DISPOSITIONS

Based on a Review of *All* Trials and a *Sampling* of Pleas of Guilty

			Pleas of Guilty[1]	Trials[2]
Convictions			277	94
Confessions			139	23
Relativity:	Confessions / Convictions		50%	24.4%
Relativity:	Confessions / Trials	23 / 120	—	19%

1. Based upon review by sampling of every 25th case where pleas of guilty came before trial (159 cases with 96 confessions) and of all pleas of guilty given after trial had commenced (118 cases with 43 confessions).

2. Based upon review of all cases tried.

New York.

WESTCHESTER COUNTY, White Plains
Leonard Rubenfeld, District Attorney

Data compiled by Leonard Rubenfeld, District Attorney with the assistance of Thomas A. Facelle, Jr., Senior Assistant District Attorney

1960 County Population: 808,891

1961: 742 FELONY DISPOSITIONS[1]

Based on Review of *All* Felony Files Closed

	Pleas of Guilty	Trials[2]	Total
Convictions	718	7	725
Confessions	608	5	613
Relativity: Confessions / Convictions	84.6%	71%	82%
Relativity: Confessions[3] 622 / Dispositions 742	—	—	83.8%
Relativity: Confessions 616 / Prosecutions 728	—	—	84.7%

1. Total indictments: 611 of which 581 were disposed of by plea of guilty, trial, or otherwise (death, fugitive, acquitted, dismissed, etc.); the 581 indictments covered 511 defendants and constituted 742 cases (a case being defined as each indictment against each defendant, e.g., one indictment involving four defendants would be computed as four cases; so also four separate indictments against one defendant would be computed as four cases).

2. Total trials: 10.

3. Total confessions: 622.

Ohio.

FRANKLIN COUNTY, Columbus

C. Howard Johnson, Prosecuting Attorney

Data compiled by Assistant
Prosecuting Attorneys

1960 County Population: 864,121

The following information was prepared by Assistant Prosecuting Attorneys under the supervision and control of Mr. Johnson (review of all cases):

Felony cases processed in 1961:		1038
Convictions	891	
Convictions having confessions prior to arraignment	731	
Relativity: $\frac{\text{Confessions}}{\text{Convictions}}$		82%
Incarcerations:		400
Incarcerations having confessions prior to arraignment	330	
Still subject to penal uthorities, having given confessions prior to arraignment:		149
Incarcerated	82	
Parolees	42	
Escaped parole violators (per Department of Mental Hygiene and Correction of Ohio)	25	

Each case has been listed in a record filed in the Office of the Clerk of the Supreme Court.

Ohio.

HAMILTON COUNTY, Cincinnati
Melvin G. Rueger, Prosecuting Attorney

Data compiled by Assistant Prosecuting Attorneys

1960 County Population: 864,121

The data was obtained by Mr. Rueger's assigning the review of the 1961 felony cases to members of his staff.

In a count of 1035 felony dispositions, there was a combined conviction figure of 926 (220 by trials; 706 by guilty pleas); furthermore, there were 667 extrajudicial confessions involved in the total felony count, being 64.4% of these cases.

Ohio.

MONTGOMERY COUNTY, Dayton
Lee C. Falke, Prosecuting Attorney

Data compiled by Walter H. Rice,
Assistant Prosecuting Attorney
1960 County Population: 527,080

There were 756 felony dispositions, but data regarding confessions as to those cases dismissed, nol-prossed, etc. is not available.

1961: 680 FELONY PROSECUTIONS[1]
Based on Review of All Felony Prosecutions

			Pleas of Guilty	Trials	Total
Convictions			629	30	659
Confessions			483	13	496
Relativity:	Confessions / Convictions		76.8%	43.3%	75%
Relativity:	Confessions / Prosecutions	502 / 680	—	—	73.8%
Relativity:	Confessions / Trials	19 / 50	—	—	38%

1. Pleas of Guilty (629) plus Trials (51).

1961: 51 TRIALS (JUDGE OR JURY)

Based on Review of All Cases Tried

	Total	Confessions Employed	Percentage of Confessions
Convictions	30	13	43.3%
Acquittals	21	6	28.6%
Percentage of Convictions	58.8%	68.4%	—

There remain incarcerated 6 defendants convicted at trials (judge or jury) through the use of confessions; a resume of these cases follows:

1. Case 22434, Billy Joe Humphrey, age 33 years—convicted on May 3, 1961 by a three-judge panel, of murder in the first degree while perpetrating a Robbery; sentenced to life imprisonment in the Ohio State Penitentiary. Defendant gave full written statement which explained all details and corroborated dying declaration of complainant.
2. Case 22459, Ben G. Holston, age 38 years—convicted on August 11, 1961 by a jury, of Murder in the first degree, with a recommendation of mercy; sentenced to life imprisonment in the Ohio State Penitentiary. Defendant gave full written statement, corroborating all details of witnesses and explaining all elements of shooting.
3. Case 22541, Raymond Byrd, age 33 years—convicted on July 7, 1961 by a jury, of armed robbery; sentenced to a term of 10-25 years in the Ohio State Penitentiary. Defendant gave full written statement which corroborated complaining witness' testimony. Defendant was on parole at the time of offense.
4. Case 22752, Alonzie Phillips, age 32—convicted on

November 29, 1961 by a jury, of armed robbery; sentenced to 10-25 years in the Ohio State Reformatory. Defendant gave full written statement concerning this and other armed robberies; said statement corroborated testimony of the complaining witness.

5. Case 22730, Ronald Edwin Lawson, age 21 years—convicted on September 12, 1961 by a jury, of operating a motor vehicle without the owner's consent; sentenced to a term of 1-20 years in the Ohio State Reformatory. Defendant gave oral statement corroborating the testimony of an accomplice. Defendant was on parole at the time of the offense.
Note: Defendant was released on parole in 1963 but returned as a parole violator on July 7, 1964 and is presently incarcerated.

6. Case 22489, Paul Edward Coble, age 30 years—convicted on October 17, 1961, by a jury, of Grand Larceny; sentenced to a term of 1-7 years in the Ohio State Reformatory; said jury verdict was affirmed on appeal. Defendant gave full written statement which corroborated accomplice testimony. Defendant was on parole at time of offense.
Note: Defendant was released on parole in 1963 but returned as a parole violator in May of 1965 and is presently incarcerated.

Pennsylvania.

PHILADELPHIA COUNTY, Philadelphia
James C. Crumlish, Jr., District Attorney (to 12/31/65)
Arlen Spector, District Attorney (effective 1/1/66)

Data compiled under the direction of Richard A. Sprague, Chief Assistant District Attorney, Prosecution Department, by the County Detectives Staff of the Office of the District Attorney

1960 County Population: 2,002,512

In a review of 376 cases in which defendants were convicted of a crime and sentenced to a term of imprisonment of at least two years, confessions were obtained in 189 of these cases. The percentage of confessions in such cases is 50%.

JUDGES' RULES [1964] 1 ALL. E. R. 237-239.

(Note: In [1964] All England Reports 237-240, coverage of the latest Judges' Rules (effective January 27, 1964) have been reported by N. P. Metcalfe as coming from Home Office Circular No. 31/1964, dated January, 1964, in a pamphlet entitled "Judges' Rules and Administrative Directions to the Police." Footnote (2) is set out verbatim except for deletions which refer to other footnotes. The complete unabridged Judges' Rules, as given in said Reports, are also included. Appendix B which is entitled "Administrative Directions on Interrogation and the Taking of Statements," involving the interpretation and directives from the Home Office is not reproduced in this brief.)

"(2) A note printed before the Judges' Rules in Appendix A in the pamphlet . . . explains that the judges control the conduct of trials and the admission of evidence against persons on trial before them, but do not control or in any way initiate or supervise police activities or conduct. The rules do not purport to deal with many varieties of conduct which might render answers and statements involuntary and therefore inadmissible, but deal merely with particular aspects of the matter. . . .

"Appendix A, in the introduction before the terms of the Rules are set out, contains the following statement: 'These Rules do not affect the principles (a) that citizens have a duty to help a police officer to discover and apprehend offenders; (b) that police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station; (c) that every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the proc-

esses of investigation or the administration of justice by his doing so; (d) that when a police officer who is making inquiries of any person about an offense has enough evidence to prefer a charge against that person for the offense, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence; (e) that it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

'The principle set out in para. (e) above is overriding and applicable in all cases. Within that principle the Judges' Rules are put forward as a guide to police officers conducting investigations. Non-conformity with these rules may render answers and statements liable to be excluded from evidence in subsequent criminal proceedings.' "

JUDGES' RULES.

"1. When a police officer is trying to discover whether, or by whom, an offense has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

"2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

"3. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

'Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.'

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

'I wish to put some questions to you about the offence with which you have been charged (*or* about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.'

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and

the record signed by that person or if he refuses by the interrogating officer.

"(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

"4. All written statements made after caution shall be taken in the following manner: (a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:

'I, ..., wish to make a statement. I want someone to write down what I say. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.'

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

"(c) The person making the statement, if he is going to write it himself, shall be asked to write out and sign before writing what he wants to say, the following:

> 'I make this statement of my own free will. I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence.'

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person

making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters; he shall not prompt him.

"(e) When the writing of a statement by a police officer is finished the person making it shall be asked to read it and to make any corrections, alterations or additions he wishes. When he has finished reading it he shall be asked to write and sign or make his mark on the following certificate at the end of the statement:

> 'I have read the above statement and I have been told that I can correct, alter or add anything I wish. This statement is true. I have made it of my own free will.'

"(f) If the person who has made a statement refuses to read it or to write the above mentioned certificate at the end of it or to sign it, the senior police officer present shall record on the statement itself and in the presence of the person making it, what has happened. If the person making the statement cannot read, or refuses to read it, the officer who has taken it down shall read it over to him and ask him whether he would like the correct, alter or add anything and to put his signature or make his mark at the end. The police officer shall then certify on the statement itself what he has done.

"5. If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply,

or starts to say something, he shall at once be cautioned or further cautioned as prescribed by rule 3(a).

"6. Persons other than police officers charged with the duty of investigating offences or charging offenders shall, so far as may be practicable, comply with these rules (3)."

TABLE IV.

COMPARISON OF CRIME INCIDENCE—1964 ENGLAND-WALES-UNITED STATES-CHICAGO AREA (CRIMES KNOWN TO POLICE).

Classification	England and Wales	United States	Chicago, Ill. Metropolitan Area
Population	47,402,000	191,334,000	6,531,000
Crimes:			
Murder and Non-negligent Manslaughter	278 (.6)	9,249 (4.8)	468 (7.2)
Forcible Rape	517 (1.1)	20,551 (10.7)	1,381 (21.1)
Robbery	3,066 (6.5)	111,753 (58.4)	17,887 (273.9)
Auto Theft	13,989 (29.5)	462,971 (24.2)	38,027 (582.3)

1. Sources: HOME DEPARTMENT, CRIMINAL STATISTICS (ENGLAND AND WALES), 1964, 2-5 (November 1965); FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1964) 49-72 (July 1965).

2. The number of crimes committed per 100,000 inhabitants is given in parenthesis.

FILE COPY

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JOHN F. DAVIS,

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

ROY ALLEN STEWART,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF AND MOTION TO DISMISS WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF

Constitutional Provisions and Statutes Involved

In addition to the Sixth Amendment and section 1 of the Fourteenth Amendment to the United States Constitution, set forth in Petitioner's Opening Brief, this case involves sections 189, 825 and 849 of the California Penal Code. The texts of those statutory provisions are set forth in Appendix A hereto.

Questions Presented

1. Did the secret police interrogation of Respondent, over a period of five days following his arrest and before he was taken before a magistrate, constitute a denial of his constitutional right to the "Assistance of Counsel," and thereby render inadmissible at trial a confession elicited during the fifth day of interrogation?

2. Under the circumstances of this case, did Respondent make a knowing and intelligent waiver of any of his constitutional rights?

3. Does Respondent's failure to request counsel distinguish this case from *Escobedo* v. *Illinois*?

4. Did the police detention of Respondent beyond their legal authority constitute a denial of liberty without due process of law in violation of the Fourteenth Amendment, and thereby render inadmissible at trial the confession elicited during the illegal detention?

In the motion to dismiss the writ of certiorari as improvidently granted, Respondent raises the further question whether the judgment of the California Supreme Court below is "final" within the meaning of 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Summary Statement of the Case

At 7:15 P.M. on January 31, 1963, Respondent, Roy Allen Stewart, was standing on the front porch of his home when he was approached by officers of the Los Angeles City Police Department and placed under arrest for "a series of purse-snatching robberies" (Rep. Tr. 691-692, 696-698, 707-708).

Stewart's wife and three other persons who were at his house were also arrested and taken into custody (Rep. Tr. 776-777). After searching the house, the officers took Stewart to the University Station of the Police Department, where he was incarcerated in a cell until February 5, 1963, when he confessed that he "snatched" the purse of a Miss Lucille Mitchell (Rep. Tr. 698-699, 710-711, 735-736, 784, 791).

During his incarceration at University Station, Stewart was interrogated by police on nine different occasions; each time he was alone with his interrogators—except during a portion of the first session on the night of January 31 when he was confronted with an accusing witness (Rep. Tr. 710-712, 716-727, 755-756, 967-968, 971). Stewart was questioned about robberies of six different women, one of which also involved rape. Finally, during the ninth interrogation, Stewart confessed that he took Miss Mitchell's purse (Rep. Tr. 736-739, 744-745). He at all times denied knowing anything about the other crimes.

Stewart testified that he gave the confession so that the police would release his wife from custody (Rep. Tr. 823-825, 880-881). This testimony was disputed by the police (Rep. Tr. 940). Shortly after Stewart confessed on February 5, his wife and the three others also arrested on January 31 were released from custody, because "there was no evidence to connect them with any crime" (Rep. Tr. 936-937).

Stewart was not taken before a magistrate until February 5, following his confession.[1]

---

[1] Counsel for petitioner has authorized counsel for respondent to represent that the records of the Superior Court of Los Angeles County in this case show this statement to be true.

An information was filed charging Stewart with kidnapping, robbing and raping a Miss Ruby Champaine, kidnapping and robbing a Mrs. Meriwether Wells, and robbing a Mrs. Tsuru Miyauchi, a Mrs. Beatrice Dixon, and a Miss Maria Louisa Ramirez (Clk. Tr. 1-6, 8-9). It also charged him with murder of Miss Mitchell "with malice aforethought" (Clk. Tr. 7). Miss Mitchell, whose purse Stewart confessed taking, had been found on the steps of a porch bleeding from the head (Rep. Tr. 607). She died the next day from head injuries (Rep. Tr. 620-631).

The jury found Stewart not guilty of the charges of kidnapping, robbing and raping Ruby Champaine and not guilty of kidnapping Mrs. Wells (Clk. Tr. 27). He was found guilty of the remaining counts of robbery and of murder of Miss Mitchell in the first degree (Clk. Tr. 27-28).[2] After a separate penalty trial, the jury fixed the penalty at death, and he was so sentenced by the court (Clk. Tr. 41). On an automatic appeal (Calif. Penal Code § 1239b), the California Supreme Court reversed the judgment of conviction as to all counts on the ground that Stewart's confession was constitutionally inadmissible under the authority of *Escobedo* v. *Illinois*, 378 U.S. 478, and *People* v. *Dorado*, 62 Cal. 2d 338, 398 P.2d 361. *People* v. *Stewart*, 62 Cal. 2d 571, 400 P.2d 97.

At the time of trial, Stewart was 28 years old (Rep. Tr. 1237). He was born the son of an illiterate Arkansas sharecropper, and he dropped out of school in the sixth grade (Rep. Tr. 1237, 1239-1240). At the time of his arrest, he

---

[2] Under California's felony-murder doctrine, murder committed in the perpetration of robbery is murder in the first degree. Calif. Penal Code § 189. The prosecution proceeded on that theory (Rep. Tr. 1063), and the jury was instructed accordingly (Supp. Clk. Tr. 28, 30-31).

said he had been working as a helper on a refuse truck (Rep. Tr. 1029-1033). At the age of 18, he was convicted of possession of one marijuana cigarette and was sent to the Youth Authority (Rep. Tr. 1241). At 23, he was convicted of second degree robbery involving three of his friends and an unknown man; he testified that the man "wanted to have some fun with a girl. So we just took him outside and took his money" (Rep. Tr. 1241-1242). He served a prison term of 2½ years (Rep. Tr. 1035).

Evidence Available to Police Before Interrogation

Prior to Stewart's arrest, the University Division of the Los Angeles Police Department had been investigating a series of robberies on the streets of a Los Angeles neighborhood during December 1962 and January 1963 (Rep. Tr. 673-682). The robberies were similar in that they all involved women whose purses or handbags were taken.

(1) On December 21, 1962, Mrs. Wells was robbed of her purse which contained, among other things, $5 to $10 in cash and three dividend checks payable to her husband, Robert K. Wells, in the sums of $10.45, $17.00, and $5.32 (Rep. Tr. 385-393). Mrs. Wells said she was "struck on the head by a colored man," who was otherwise unidentified (Rep. Tr. 379-380).

(2) On January 10, 1963, Mrs. Tsuru Miyauchi received a blow on the head and was robbed of a leather lunch bag which contained a change purse and $9 or $10 in cash (Rep. Tr. 506-509, 588). Mrs. Miyauchi did not see anyone attack her; she remembered only "collapsing to the ground" (Rep. Tr. 509).

(3) On January 19, 1963, Miss Lucille Mitchell was found on the steps of a porch bleeding from the head (Rep. Tr.

607). She died the next day, without having identified the assailant (Rep. Tr. 604-609, 611-616, 620).[3]

(4) On January 25, 1963, Mrs. Beatrice Dixon was robbed of a leather bag that contained, among other things, a coin purse and $23 in cash (Rep. Tr. 525-530). She testified that she was hit on the head by an unidentified person (Rep. Tr. 528-529).

(5) On January 30, 1963, Miss Maria Louise Ramirez was robbed of a purse containing a wallet and $2 in cash (Rep. Tr. 551-555). Miss Ramirez said she was struck on the back of the head by someone whom she did not see (Rep. Tr. 554-557). A witness to the incident said the assailant was a colored man (Rep. Tr. 562).[4]

Stewart was never positively identified as the person who committed any of these crimes. He was linked to the robberies by the dividend checks which were in the purse taken from Mrs. Wells. The checks were negotiated with endorsements by "Robert K. Wells" and "Lena M. Franklin," including Mrs. Franklin's address and telephone number (Rep. Tr. 385-388, 485-487). On January 30, 1963, the police were supplied with copies of the negotiated checks, and the next day they located Mrs. Franklin (Rep. Tr. 684-686). Apparently, she told the police that she had co-signed the checks to help a friend, who had been introduced to her as "Roy Wells," cash them at a market where she traded (Rep. Tr. 489, 686, 697, 1044, 1055-1057).

---

[3] Several items, identified as belonging to her, including a silver cuff link, an earplug for a transistor radio, and a lady's watch, were found in Stewart's home (Rep. Tr. 598-602, 701-702, 707-708).

[4] At the trial, this witness testified that while she was "not sure," she was of the "opinion" that Stewart was the assailant, based upon the fact that, at the trial, Stewart was wearing clothes that looked to her like the clothes the assailant was wearing at the time of the incident (Rep. Tr. 571-572, 574, 576-577).

Mrs. Franklin then led Logue and other officers to Stewart's home at 1912 West 39th Street, Los Angeles, where they found him standing outside on his porch (Rep. Tr. 502, 690-692, 698). Mrs. Franklin identified Stewart to the officers as the person who had endorsed and cashed the checks as "Robert K. Wells" (Rep. Tr. 491).

Logue immediately placed Stewart under arrest for "a series of purse-snatching robberies" (Rep. Tr. 696-698). The time of the arrest was 7:15 P.M., January 31, 1963 (Rep. Tr. 698).

Logue testified that at the time of the arrest he asked Stewart if he could "look around" the house, and Stewart said, "Go ahead" (Rep. Tr. 698). Logue and two other officers then conducted a "very thorough" two-hour search of Stewart's residence, including "every drawer and every closet" (Rep. Tr. 758). They found various purses and wallets taken from Mrs. Wells, Mrs. Miyauchi, Mrs. Dixon and Miss Ramirez, and the watch taken from Miss Mitchell (Rep. Tr. 384-393, 512-517, 526-530, 550-558, 600-601, 699-704).

The Incarceration and Interrogation of Respondent

Three Los Angeles police officers, Sergeants Logue, Mangiameli and Jensen, interrogated Stewart nine times during the five days he was incarcerated at the University Police Station (Rep. Tr. 755-756). Following is their version of the interrogations:

(1) *January 31, 1963, "sometime after 10:00 P.M."* (Rep. Tr. 710).

Logue and Mangiameli interrogated Stewart for "approximately 20 minutes" (Rep. Tr. 712, 717).[5] After pre-

[5] The conversation was taped and a corrected transcript read to the jury (Rep. Tr. 973, 989, 1044-1057).

liminary questioning (Rep. Tr. 1026-1035), Logue and Stewart had the following colloquy:

> Logue: "Well, Roy,—"
>
> Stewart: "Yes, sir."
>
> Logue: "You've got yourself a problem—I don't know what experiences you've had in the past, but I would think that if you had been around a little bit, as you may have been, that you'd know that the desire to try straighten things out—"
>
> Stewart: "Yes, sir."
>
> Logue: "And feeling sorry for what happened, you know, means a great deal to a great many people that you're going to be coming in contact with."
>
> Stewart: "Yes, sir."
>
> Logue: "The thing that we're after is the truth."
>
> Stewart: "Uh-huh."
>
> Logue: "And, I don't know how smart you are, but if you're as smart as I think, you'll tell the truth."
>
> Stewart: "I'll tell the truth."
>
> Logue: "Now, we've got a pretty fair idea of what you've been doing. . . . " (Rep. Tr. 1035-1036).

Logue then produced two of the Wells dividend checks, and asked Stewart whether he had ever seen them before (Rep. Tr. 717, 970-971, 1036). Stewart denied knowing anything about them (Rep. Tr. 717, 970-971, 1036). He also denied knowing Lena Franklin (Rep. Tr. 717, 971, 1036-1037). At that point, Logue left the room and returned with Lena Franklin (Rep. Tr. 971, 1037-1038). She identified Stewart as the person who endorsed the checks as

"Robert K. Wells" and cashed them (Rep. Tr. 971-972, 1038-1039). Stewart did not comment on Lena Franklin's statements (Rep. Tr. 1057-1058).

(2) *February 1, 1963, at 11:00 A.M.* (Rep. Tr. 718).

Logue and Jensen interrogated Stewart on this occasion for "approximately 20 minutes" (Rep. Tr. 718). Again Stewart was asked about the Wells checks, which he again denied cashing, and about Lena Franklin, whom he again denied knowing (Rep. Tr. 718-719). Stewart "voluntarily gave a handwriting exemplar and certain procedural matters were involved" (Rep. Tr. 719).

(3) *February 1, 1963, at 3:00 P.M.* (Rep. Tr. 719).

Logue and Jensen interrogated Stewart for "about five or six minutes" (Rep. Tr. 719). Jensen told Stewart that in the opinion of the handwriting expert who had made a comparison, Stewart had signed the name "Robert K. Wells" on the checks (Rep. Tr. 719). Stewart again denied it, but said he wanted to speak to Lillian Lara, his wife,[6] and that he might have something to tell the officers after he had talked to her (Rep. Tr. 719-720).

(4) and (5) *February 3, 1963, commencing at 11:00 A.M.* (Rep. Tr. 720).

This time Logue and Mangiameli talked to Stewart for "about five minutes" (Rep. Tr. 720-721). Stewart again stated he wanted to talk to Lillian Lara and following that

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[6] Stewart's testimony that he had married Lillian Lara in Mexico in October 1964 is corroborated elsewhere in the record (Rep. Tr. 851, 751, 793). Of the four other persons who were arrested along with Stewart, Lillian Lara was the only one who had also been living at the house (Rep. Tr. 750, 776-777, 793-794, 937).

he might have something to say to the officers (Rep. Tr. 721). Logue testified: "We agreed to let him talk to Lillian Lara" (Rep. Tr. 721). After talking to Lillian Lara, Stewart was questioned "again . . . for about five minutes" (Rep. Tr. 721). During this session, he admitted endorsing and cashing the Wells checks, but said he had found them "at the base of a tree at 37th and Western" (Rep. Tr. 721-722). The officers then showed him Mrs. Wells' purse and wallet, which he denied ever having seen (Rep. Tr. 722).

Shortly after 1:00 P.M. on February 3, Logue returned to Stewart's home in the company of several other officers and Lillian Lara (Rep. Tr. 705-706). The officers again searched the premises and found Miss Ramirez' glasses and case in a drawer (Rep. Tr. 557, 707) and Miss Mitchell's silver cuff link and transistor earplug "lying on top of a television set" in Stewart's living room (Rep. Tr. 598-600, 707-708).

(6) and (7) *February 4, 1963, at 11:45 A.M.* (Rep. Tr. 722-723).

Logue and Mangiameli conducted this interrogation (Rep. Tr. 723). Logue said on direct examination that it lasted for "about 30 minutes" (Rep. Tr. 723). Logue showed Stewart various items identified as having been taken from the five robbery victims. He denied knowledge of them, with one exception: He said that the purse identified as Mrs. Wells' had been in his possession at an earlier time (Rep. Tr. 723-725). Also on the morning of February 4, 1963, Stewart was interrogated for an "hour and a half to two hours" by other officers (Rep. Tr. 756).

(8) *February 4, 1963, in the afternoon* (Rep. Tr. 725).

Logue and Mangiameli interrogated Stewart for "approximately one hour" during the afternoon of February 4 (Rep. Tr. 725-726). Logue testified that on this occasion Stewart said that Miss Ramirez' purse had been brought to the back porch of his home by someone; that Miss Mitchell's watch had been brought to his house by someone, but a few moments later said that he had bought it on the street as a present for Lillian Lara; and that he had found Mrs. Miyauchi's coin purse on the street and had given it to Lillian Lara (Rep. Tr. 726). For the first time, he was asked about robbing and raping Miss Ruby Champaine, which he denied (Rep. Tr. 757).[7]

(9) *February 5, 1963, at 8:30 A.M.* (Rep. Tr. 727).

Logue and Mangiameli interrogated Stewart for "approximately 20 minutes" beginning at 8:30 A.M. February 5 (Rep. Tr. 727). The latter portion of the conversation was taped (Rep. Tr. 727-728, 732-733). The pre-recording portion of the interrogation (from Logue's testimony on redirect examination) was as follows:

> "Yes, the defendant was in a room and I entered the room and sat down and I said to him, 'Roy, you killed that old woman over on Cimarron Street and you are not even sorry.'
>
> "And then there was no reply, and I waited for a period of time.

[7] Logue's testimony on Stewart's answer to the question about Miss Champaine was: "He said no, that he hadn't. He further stated that he had done lots of things but that he had never snatched a purse or committed a crime against a woman" (Rep. Tr. 757).

"Then I again said, 'Roy, you killed that old woman over on Cimarron Street and you are not even sorry.'

"And after a few moments he said, 'Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her.'[8]

"I then took out the pictures of the scene on Cimarron Street, and the color photographs of the person of Mrs. Mitchell, and I pointed to the photograph showing the birch trees in front of the location—

* * * * *

"Then the defendant told me that he had run up behind her and grabbed her purse and she had fallen down and he had kicked her. He stated he didn't hit her. He said that he had gone home and given Lillian the watch, and at about that time I stood up, excused myself for a moment, and left the room, and turned on the tape recorder and again reentered the room.

"My final statement was, before I left, I told him I thought he would now feel better that he was telling the truth.

"Q. Then you left the room and turned on the tape recorder, is that correct?

"A. That's correct" (Rep. Tr. 789-790).

The taped portion of the interrogation started, with Logue asking the questions, as follows:[9]

"Q. Well, Roy, as I said before, as I said all along, I think you are going to feel much better now that you

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[8] On cross-examination Logue had been asked: "As a matter of fact, he never did say that he had killed her, did he?" Logue answered: "No, he never used that word" (Rep. Tr. 782).

[9] An edited typewritten transcription of the taped interrogation was read to the jury (Rep. Tr. 733-734).

have laid this business right out in the open, and just as I told you, believe me, now, what you tell us are the things that we will tell other people.

"Now, you said you did it, you're sorry, and that is just exactly what the word is going to be as far as we are concerned" (Rep. Tr. 734).

After further questioning during which Logue pointed out the details of the Mitchell case to Stewart (Rep. Tr. 734-736), the interrogation proceeded as follows:

"Q. And then you say you ran up behind her and snatched her purse?

"A. Snatched her purse, yes, sir, that is what I done.

"Q. And that you didn't hit her on the head?

"A. No, I didn't hit her on the head, sir. I didn't. Anything, I could have kicked her, you know, after she fell. I was running. I could have kicked her in the head, but I'm not sure of that.

"Q. Did you grab her by the arm at all?

"A. No, I didn't.

* * * * *

"Q. You didn't?

"A. I grabbed her purse.

"Q. You see, the reason I am asking, here is a picture of her arm.

* * * * *

"—and it shows bruise marks on the side of the arm, and we were—

"A. I didn't grab her arm at all.

"Q. You didn't?

"A. Honestly I didn't.

"Q. You—do you recall which arm she had her purse on?

"A. It was on the right arm.

"Q. It was on the right arm?

"A. Yes, sir.

"Q. You see, here are the scrape marks on the side of the face.

• • • • •

"A. Uh-huh.

"Q. And this photograph, here, and you say, I believe, that as she fell she struck the sidewalk—

• • • • •

"A. Yes, she did, that is what happened, I remember that because I snatched her purse, see, I was running, I snatched her purse and that is where she fell. I could have kicked her.

"Q. Now, this is—you see the injury right here on top of the head in this photograph and I'm—

• • • • •

"And this is the one that caused her death, you see, it is on the left side, see, back about in this position, and it looks like a round, circular thing with several lacerations around it.

"A. But I didn't hit her. I know I didn't hit her. I am positive of that, sir. I know I did not hit her.

"Q. Then, Roy, as soon as this had happened, what did you do, go directly home?

"A. Yes, I did.

"Q. Uh-huh, and gave Lillian the watch?

"A. No, I didn't give it to her just then.

"Q. Oh, didn't you?

"A. No.

"Q. When did you give it to her, if you remember?
"A. Later on that evening" (Rep. Tr. 736-739).

Logue then questioned Stewart further about the Wells, Ramirez and Miyauchi cases, and Stewart again denied any involvement (Rep. Tr. 739-743). Logue returned to the Mitchell case, and the interrogation concluded as follows:

"Q. Well, tell me how it happened. You turned the corner and she's up, part way up the block there?

"A. I just started walking. As I got almost to her I just started running and snatched her purse; that is how it happened.

"Q. Do you recall what you did with the purse?

"A. No, no, I can't.

"Q. As soon as you snatched it she fell down and you may have kicked her?

"A. I may have. I really didn't hit her with nothing.

"Q. And then you ran from there directly home, and then sometime a little later in the evening gave Lillian the watch and told her that you had bought it and you put the cufflink and little earplug on the television" (Rep. Tr. 744-745).

Respondent's Version of the Facts

At the trial, Stewart took the stand and denied kidnapping, raping or robbing Miss Champaine (Rep. Tr. 816-817).

He also denied robbing Mrs. Wells, although he admitted that he had cashed the dividend checks (Rep. Tr. 818). He testified that he had obtained the checks from his niece, Jackie Jackson, and cashed them at her request

in the presence of Lena Franklin (Rep. Tr. 818-819).[10] He denied having seen the Wells purse prior to the first interrogation by Sergeant Logue on January 31, 1963 (Rep. Tr. 820-822).

Stewart denied having anything to do with the robbery of Miss Mitchell or any of the injuries she sustained (Rep. Tr. 822). He testified that he bought the watch, identified as Miss Mitchell's, from Louis Bookman for $15.00 on the evening of January 19, 1963 (Rep. Tr. 825, 841-842). He testified further that he had seen the transistor radio earplug and a charge-a-plate with Miss Mitchell's name on it, each for the first time, on January 26, 1963, in his home; the latter item, he said, was then in the possession of Jackie Jackson (Rep. Tr. 878-879).[11] He denied ever having seen the cuff link (Rep. Tr. 878).

Stewart did not testify about the Dixon, Ramirez, or Miyauchi robberies (Rep. Tr. 816-829).

As to the confession, Stewart testified that the only reason he gave Logue the confession was in order to get his pregnant wife, Lillian Lara, released from custody. According to Stewart, Logue had told him that they would not let her go until he confessed, despite the fact that she was ill (Rep. Tr. 823-825, 880-881).

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[10] Jackie Jackson testified that she bought the checks from a Louis Bookman and asked Stewart to cash them for her (Rep. Tr. 889-893).

[11] Jackie Jackson testified that she was present when Stewart bought the watch from Louis Bookman (Rep. Tr. 887-888). She further testified that she got the charge-a-plate with Miss Mitchell's name on it from Louis Bookman (Rep. Tr. 887). According to Miss Jackson, Louis Bookman made a living "snatching purses and knocking peoples in the head" (Rep. Tr. 885). Linda Lara, Lillian Lara's 14-year-old daughter, testified that when she arrived home from school one day, Jackie Jackson and Louis Bookman were there, and that Jackie left the house with the Mitchell charge-a-plate, which Linda had never seen before (Rep. Tr. 795-796).

On rebuttal, Logue denied that he had told Stewart that Lillian was sick or upset or that Lillian would be released if Stewart confessed (Rep. Tr. 940).

Summary of Argument

I.

This case is controlled by *Escobedo* v. *Illinois,* 378 U.S. 478. It is factually indistinguishable from *Escobedo,* save for the absence of a request to consult with counsel. A request, however, is unnecessary to bring into play the constitutional right to counsel. E.g., *Carnley* v. *Cochran,* 369 U.S. 506.

The State in its Opening Brief makes no serious attempt to distinguish this case from *Escobedo* except for the absence of a request. The State's attacks on the so-called "*Dorado* rule" are directed at *Escobedo* itself. The facts of the present case offer a compelling answer to such attacks. These facts illustrate that *Escobedo* is necessary to the full development of the constitutional right to the "Assistance of Counsel."

In *Escobedo* the Court rejected the sterile notion that a criminal prosecution, with the attendant right to counsel, does not begin until the initiation of formal judicial proceedings. In determining that a criminal prosecution begins when a person effectively stands accused of a crime by the forces of the State, the Court reaffirmed the functional approach to the Sixth Amendment taken in such cases as *Powell* v. *Alabama,* 287 U.S. 45, *Hamilton* v. *Alabama,* 368 U.S. 52, *White* v. *Maryland,* 373 U.S. 59, and *Massiah* v. *United States,* 377 U.S. 201. *White* and *Massiah* directly

compelled the result in *Escobedo,* for the cases are substantively indistinguishable.

The five-day secret pre-trial proceeding against Stewart demonstrates that the rule of *Escobedo* is necessary to prevent law enforcement officers from circumventing the safeguards of the accusatorial, adversary trial. For all practical purposes, the State tried and convicted Stewart in a back room of the University Police Station. On the fifth day of interrogation about a string of crimes including robbery, rape and murder, they elicited from him a simple confession that he "snatched" one woman's purse. But this confession was sufficient to send him to the gas chamber. What Stewart could hardly be expected to know, in the absence of legal advice, was that under the felony-murder doctrine he was confessing to first-degree murder. The harshness of the felony-murder doctrine as applied in this case dramatizes the empty formalism of a rule that would deny an accused the right to counsel until after the return of formal charges, an event that police may delay by prolonged detention.

Proceedings against Stewart had reached "the accusatory stage" before the confession, and the State does not argue to the contrary in its Opening Brief. On this point, the present case is indistinguishable from *Escobedo.* The police investigation sharply focused on Stewart as an accused when Lena Franklin identified him as the one who cashed dividend checks taken from Mrs. Wells, one of the robbery victims. He was then placed under arrest for "a series of purse-snatching robberies" and held in police custody for five days without being taken before a magistrate. The police engaged in a process of interrogations clearly lending itself to eliciting incriminating statements.

Stewart was denied his right to counsel because the police conducted an adversary proceeding against him in the absence of counsel, and he did not waive his right to counsel. The State's arguments suggesting that Stewart made a knowing and independent waiver are specious. There is no suggestion that he was advised by his interrogators or anyone else of his right to counsel or of any of the other rights that counsel would protect, especially the right to be taken before a magistrate without unnecessary delay and the right to remain silent. Nor did anyone advise him of the fatal implications of the felony-murder doctrine.

The State's argument that this case should be distinguished from *Escobedo* on the absence of a request conflicts sharply with established constitutional principles. *Escobedo* established the assistance of counsel as a constitutional requirement once the accusatory stage is reached. *Carnley* v. *Cochran* established that where the assistance is a constitutional requisite the right to counsel does not depend upon a request.

Escobedo v. *Illinois,* when coupled with *Carnley* v. *Cochran,* provides ample authority for affirming the judgment of the California Supreme Court reversing Stewart's conviction.

II.

The judgment reversing Stewart's conviction may be affirmed on the alternative ground that his confession was elicited during a period of unauthorized police detention. California statutory law requires that the police take an arrested person before a magistrate "without unnecessary delay" and establishes a two-day maximum period of detention. Stewart was detained and not taken before a

magistrate until his confession was elicited on the fifth day following his arrest. In thus acting beyond the limits of their legal authority, the police deprived Stewart of his liberty without due process of law in violation of the Fourteenth Amendment.

This Court has recognized that the only effective deterrent to unconstitutional police conduct is to exclude evidence unlawfully obtained. E.g., *Mapp* v. *Ohio,* 367 U.S. 643. The exclusionary rule should be applied to render inadmissible Stewart's confession elicited during his illegal detention.

Wong Sun v. *United States,* 371 U.S. 471, and *Traub* v. *Connecticut,* 374 U.S. 493, compel this result. The unlawful imprisonment of Stewart is no less repugnant to our constitutional liberties than the unlawful invasion of privacy in *Wong Sun.*

ARGUMENT

I.

The Judgment of the California Supreme Court Should Be Affirmed on the Authority of Escobedo v. Illinois.

We submit that the California Supreme Court correctly decided, on the authority of *Escobedo* v. *Illinois,* 378 U.S. 478, that Stewart's confession was inadmissible at trial because it was elicited by police during the course of an interrogation at which Stewart was denied the "Assistance of Counsel" guaranteed by the Constitution in all criminal prosecutions. The present case is factually indistinguishable from *Escobedo,* save that Escobedo requested counsel and Stewart did not. A request, however, is unnecessary to

bring into play the constitutional right to counsel. E.g., *Carnley* v. *Cochran*, 369 U.S. 506.

A. The Facts of the Present Case Forcefully Illustrate That the Rule of Escobedo v. Illinois is Necessary if the "Assistance of Counsel" Is to Be a Meaningful Constitutional Right.

The State makes no serious argument that the present case is distinguishable from *Escobedo*, except with respect to the absence of a request for counsel. In arguing that *Escobedo* should not be "extended" to include what it calls the *"Dorado* rule," the State ignores *Carnley* v. *Cochran*, *supra*, and other precedents that the right to counsel does not depend on a request.

The State's attacks on the so-called *"Dorado* rule" go beyond the request issue and become transparent attacks on *Escobedo* itself. For example, the State frets in its Brief about the problem of determining what is "a process of interrogations that lends itself to eliciting incriminating statements." Petitioner's Opening Brief 42-45. Yet that question is not in dispute here because the State concedes by its silence that such a process of interrogations had been undertaken against Stewart before his confession was elicited.

We submit that a compelling answer to the State's attacks on *Escobedo* derives from the facts of the present case. For those facts illustrate why *Escobedo* is necessary to the full development of the constitutional right to the "Assistance of Counsel," the "most pervasive" of all the rights of an accused person. Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956).

In *Escobedo*, this Court examined the concept of a "criminal prosecution" within the meaning of the Sixth and Fourteenth Amendments and explored its initial boundaries. The Court rejected the sterile notion that a criminal prosecution, with the attendant right to counsel, does not begin until the initiation of formal judicial proceedings. Rather, reaffirming its functional approach to the interpretation of the Sixth Amendment, the Court determined that a criminal prosecution begins when a person effectively stands accused of a crime by the forces of the State. That point is reached, the Court said, ". . . when the process shifts from the investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession . . . ." 378 U.S. at 492. At that point, the adversary system begins to operate against an accused, and his right to counsel comes into play.

The result in *Escobedo* followed inexorably from a series of cases in which this Court took a functional rather than a formalistic approach to the "right-to-counsel" issue, beginning with *Powell* v. *Alabama*, 287 U.S. 45, and continuing to *Massiah* v. *United States*, 377 U.S. 201.[12] In *Powell*, the Court held that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against him" including a stage sufficiently before trial to give the lawyer time for adequate preparation of the defense. 287 U.S. at 59, 69. In *Hamilton* v. *Alabama*, 368 U.S. 52, 54, the Court held that "every step in the proceedings" against the accused included arraignment, for that was "a critical stage in a criminal proceeding. What happens there may affect the whole trial."

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[12] For a comprehensive treatment of pre-*Escobedo* trends, see Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio St. L.J. 449 (1964).

White v. *Maryland*, 373 U.S. 59, and *Massiah* v. *United States*, 377 U.S. 201, directly compelled the result in *Escobedo*—unless constitutional rights were made to hinge on distinctions devoid of substance. In *White*, the Court held that a guilty plea entered at a preliminary hearing in the absence of counsel was inadmissible at trial, and surely no significant distinction can be drawn between an uncounseled confession given to a judge in open court and one given to the police in a secret jailhouse interrogation. In *Massiah*, the Court assured the right to counsel during police interrogation after indictment, thereby erasing the line between judicial and extrajudicial proceedings in determining the stages at which an accused is entitled to legal aid and advice.[13] The Court there (377 U.S. at 204) relied upon the sound reasoning of Mr. Justice Stewart's concurring opinion in *Spano* v. *New York*, 360 U.S. 315, 327:

> "Our Constitution guarantees the assistance of counsel to a man on trial for his life in an orderly courtroom, presided over by a judge, open to the public, and protected by all the procedural safeguards of the law. Surely a Constitution which promises that much can vouchsafe no less to the same man under midnight inquisition in the squad room of a police station."

After *Massiah*, the only remaining question was whether a line drawn between police interrogations before and after indictment was rational. Such a line had already been criti-

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[13] The result in *Escobedo* was predicted by Mr. Justice White in his dissenting opinion in *Massiah*: "The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not . . . ." 377 U.S. at 208.

cized by the Chief Justice of California as "formalistic." *People* v. *Garner*, 57 Cal. 2d 135, 160, 367 P.2d 680, 695 (Traynor, *J.*, concurring). And Mr. Justice Douglas, joined by the Chief Justice, Mr. Justice Black and Mr. Justice Brennan, had argued against such a distinction because "what takes place in the secret confines of the police station may be more critical than what takes place at the trial." *Crooker* v. *California*, 357 U.S. 433, 444-445 (dissenting opinion).

In *Escobedo*, the question was laid to rest; the Court rejected a distinction between interrogation of an accused before and after formal indictment as not "meaningful." 378 U.S. at 486.[14]

Not only is *Escobedo* firmly grounded in precedent, it is also firmly grounded in the underlying principle that "ours is the accusatorial as opposed to the inquisitorial system" of criminal justice. *Watts* v. *Indiana*, 338 U.S. 49, 54. The doctrine of *Escobedo* is necessary to prevent law enforcement authorities from circumventing the safeguards

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[14] That the right to counsel may accrue during pre-indictment interrogation had been acknowledged by the majority in *Crooker* v. *California*, *supra*. The Court decided, however, that the right was not absolute, but was qualified by a standard of "fundamental fairness" that depended upon such circumstances as the age, intelligence, and education of the accused (357 U.S. at 438-439), a decision, in the view of the majority, consistent with *Betts* v. *Brady*, 316 U.S. 455. When *Betts* v. *Brady* was overruled by *Gideon* v. *Wainwright*, 372 U.S. 335, and the right to counsel at trial was made absolute, a major premise of *Crooker* was undermined. *Escobedo*, therefore, may be said to be an offspring of *Crooker*, which conceded that the right to counsel might accur during pre-indictment interrogation, and *Gideon*, which established that the right to counsel is so "fundamental," it is available unqualifiedly to every accused. 372 U.S. at 342. See Comment, 53 Calif. L. Rev. 337, 348-353 (1965); Comment, 73 Yale L.J. 1000, 1001-1002, 1012-1014 (1964).

of the accusatorial, adversary trial.[15] The facts of the present case demonstrate that necessity. Indeed, the evils of the inquisitorial system come to mind as we visualize Stewart's secret detention for five days of questioning and recall Mr. Justice Frankfurter's reference in *Watts* v. *Indiana* to "the practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end." *Ibid.*

Stewart's plight during his five days of incarceration demonstrates why the right to counsel would indeed be "a very hollow thing" (*In re Groban*, 352 U.S. 330, 344 (Black, *J.*, dissenting)) if it were not afforded until after the police chose to take a suspect before a magistrate to be formally charged. For Roy Stewart, just as for Danny Escobedo, the right to a lawyer at the pleading or trial stage was a right of little worth; he had already lost his case in a secret pre-trial proceeding conducted in a back room of the University Police Station. The State emerged the clear winner of the five-day contest; Stewart, armed with his sixth-grade education, had hardly provided the challenge that is "the essence of our adversary system." REPORT OF ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 10 (1963).

Without the "guiding hand of counsel," Stewart was no match for the adversary power represented by Sergeant

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[15] See the following on the point that the principal rationale of *Escobedo* is that certain police interrogations are realistically part of the adversary process: Robinson, *Massiah, Escobedo, and Rationales for the Exclusion of Confessions*, 56 J. Crim. L. 412, 421-422 (1965); Comment, 53 Calif. L. Rev. 337, 361 (1965); Note, 78 Harv. L. Rev. 143, 219 (1964); Note, 32 U. Chi. L. Rev. 560, 570-571 (1965). See also Comment, 73 Yale L.J. 1000, 1041, 1051 (1964). Before *Escobedo*, the adversary nature of our criminal system was suggested as the rationale of recent coerced confession cases. Note, 31 U. Chi. L. Rev. 313, 320-327 (1964).

Logue and his fellow officers, a power doubtless exaggerated by Stewart's prolonged detention in jail. Stewart faced his accusers and interrogators alone. There was no one to advise him how to remedy the flagrantly illegal conduct of the police in holding him for five days without taking him before a magistrate;[16] there was no one to advise him that the police had no legal power to compel him to talk; there was no one to advise him of the legal consequences of the answers he might give. There was no one, for example, to tell him that to confess to taking Miss Mitchell's purse was to confess to first-degree murder under California's felony-murder doctrine, that to admit purse-snatching was to send himself to the gas chamber.

We submit that the harshness of the felony-murder doctrine illustrates the empty formalism of a rule that would deny an accused the right to counsel until after indictment—an event that the police have the power to delay by prolonging the detention until they get their confession. On this record, one could easily imagine that after five days of secret interrogation on a string of crimes, including robbery, rape and murder, Stewart decided to end the seemingly interminable jailhouse proceedings by confessing simply that he took one woman's purse. In short, he may have thought he could "plea bargain" for himself, thereby avoiding the risk of a more serious conviction, whether guilty or innocent.[17] If this was Stewart's game, the stake

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[16] California law requires that a person arrested must be taken before a magistrate "without unnecessary delay" and, in any event, within 48 hours after arrest. Calif. Penal Code §§ 825, 849.

[17] Professor Kamisar has noted that a "good deal" of plea bargaining takes place in the police station. Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, CRIMINAL JUSTICE IN OUR TIME 37 (1965).

was his life, for under the felony-murder doctrine, he confessed to an offense that carried the death penalty.[18]

We can have little confidence, of course, in our knowledge of what really happened during Stewart's five days at the University Station. Such uncertainty is inherent in the process of secret detention and interrogation. Indeed, it is secrecy that is at the root of the problem. See Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,* CRIMINAL JUSTICE IN OUR TIME 86 (1965). But a careful reading of the available record suggests that the prolonged detention and the talk of more serious crimes very well may have driven Stewart to give a confession limited to taking Miss Mitchell's purse. Before his confession on February 5, he had denied any involvement in the various crimes he was asked about. His admissions that he had possession of some of the stolen purses and other items were always accompanied by exculpatory explanations (Rep. Tr. 722, 724-725, 726, 818-819, 820-822, 825, 841-842, 878-879).

The transcript of the February 5 confession (Rep. Tr. 732-745) suggests that Stewart avoided saying that he killed Miss Mitchell or intentionally hit or kicked her. He admitted that he "snatched her purse, yes, sir, that is what I done," but when asked whether he hit her on the head,

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[18] We submit that *Escobedo* aside, Stewart's confession should be inadmissible on the authority of the dictum in *Crooker* v. *California,* 357 U.S. at 439. Stewart's inadequate education, his obvious lack of sophistication, the failure to inform him of his right to counsel or his right to remain silent, the pressures of the long detention and the persistent questioning about serious crimes, his isolation and the secrecy of the whole process, the ramifications of the felony-murder doctrine—these circumstances must add up to fundamental unfairness deriving from the absence of counsel.

he replied: "No, I didn't hit her on the head, sir. I didn't. Anything, I could have kicked her, you know, after she fell, I was running. I could have kicked her in the head, but I'm not sure of that" (Rep. Tr. 736). Toward the end of the interrogation he was again asked how it happened (Rep. Tr. 744). He answered, "I just started walking. As I got almost to her I just started running and snatched her purse; that is how it happened" (Rep. Tr. 744-745).

On cross-examination, Sergeant Logue testified that he turned on the tape recorder "after he [Stewart] told me that he had killed her" (Rep. Tr. 782). He was asked further, however, "As a matter of fact, he never did say that he had killed her, did he?" And Logue answered, "No, he never used that word" (Rep. Tr. 782). Yet a few minutes later on redirect, Sergeant Logue, apparently in a burst of zeal, contradicted himself by quoting Stewart as having said, "Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her" (Rep. Tr. 789).[19]

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[19] The State argues: "Stewart's confession, however, was the product of his own will and his own remorse. Otherwise, why would he have admitted killing Miss Mitchell and denied having robbed the other four women? Even a 6-year-old child knows that killing is worse than stealing." Petitioner's Opening Brief 38. This argument ignores Sergeant Logue's testimony that Stewart never admitted "killing" Miss Mitchell, a fact corroborated by the transcript of the recorded portion of the confession. At trial Stewart testified that he "copped to the murder beef" (to get his wife released) (Rep. Tr. 823-824), but his hindsight version of the confession was denied by Logue (Rep. Tr. 940) and is not supported by the transcript of the confession. That testimony of Stewart's could hardly support an argument that he knew, back there in the jail, that he was confessing to murder.

B. Respondent's Confession Was Obtained at a Stage in the Proceedings When He Was Constitutionally Entitled to the Assistance of Counsel.

The proceedings against Stewart had reached "the accusatory stage" by the time his confession was elicited, and the State does not argue to the contrary in its Opening Brief.

To be sure, marking the beginning of a criminal prosecution at the accusatory stage makes it more difficult to decide, in individual cases, when the attendant right to counsel attaches, than marking it at the initiation of formal judicial proceedings. Simplicity, however, is hardly a reason for artificially restricting constitutional rights. With time, the operation of the judicial process will inevitably work out detailed guidelines for determining when the right to counsel accrues before indictment.

In *Escobedo,* three circumstances were cited to show that the accusatory stage had been reached: (1) "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect"; (2) "the suspect has been taken into police custody"; and (3) "the police carry out a process of interrogations that lends itself to eliciting incriminating statements." 378 U.S. at 490-491.

Whether these circumstances represent necessary or merely sufficient conditions to the establishment of the right to counsel is a question that must await further adjudication testing the limits of *Escobedo.* The present case does not test those limits, for Stewart's position at the time of his confession is indistinguishable from Escobedo's. Here, as in *Escobedo,* the State had clearly proceeded to

the accusatory stage and Stewart was constitutionally entitled to the assistance of counsel.

(1) *The Los Angeles Police were no longer investigating an unsolved crime but had begun to focus on Stewart as a particular suspect.*

The point at which the investigation ceased being a general inquiry into an unsolved crime and began to focus on Stewart is distinctly marked. Until January 30, 1963, the day before Stewart was arrested, the University Division of the Los Angeles Police Department had been conducting a general investigation of a series of unsolved purse-snatching robberies. The nature of the investigation changed abruptly when the police obtained copies of the Wells dividend checks bearing Lena Franklin's signature and address as a co-endorser. Lena Franklin was found the next day, and she promptly identified Stewart as the one who had cashed the checks. The checks, when coupled with Lena Franklin's identification, constituted strong evidence linking Stewart to the crimes and providing the basis for his arrest for "a series of purse-snatching robberies." At that point the inquiry focused on Stewart as an accused.[20]

If more evidence was needed to sharpen the focus, the police quickly obtained it. At the time of his arrest, they searched Stewart's home and found personal items that had been taken from each of the five robbery victims. Sev-

[20] The California Supreme Court pointed out in the opinion below that the arrest itself was evidence that the investigation had begun to focus on Stewart because of the requirement of California Penal Code § 836 that an arrest must be based upon the officer's reasonable cause for believing the person committed the offense. 62 Cal. 2d at 577; 400 P. 2d at 101.

eral of the items were easily identifiable: one was a wallet bearing Mrs. Wells' maiden name; another was a purse and a key holder bearing the name "Takiko Miyauchi"; another was a wallet with the initial "R" for "Ramirez"; they also found Miss Mitchell's watch (Rep. Tr. 384-393, 512-517, 550-558, 600-601, 699-704).

By the time Stewart was taken to the University Police Station, he had, for all practical purposes, been charged with the crimes. Compare *Escobedo* v. *Illinois*, 378 U.S. 478, 486. During the first interrogation on January 31, the police told him, "Now we've got a pretty fair idea of what you've been doing," and when he denied having seen the Wells checks, he was told, "You know we're gonna be able to prove differently, don't you?" (Rep. Tr. 1036-1037) He was then confronted with Lena Franklin, who accused him to his face with having endorsed and cashed the checks.[21]

On February 1, he was told that a handwriting expert had expressed the opinion that he had written the name "Robert K. Wells" on the checks; on February 3, the police extracted the first incriminating statement—that he had signed and cashed the Wells checks; on February 4, he admitted having seen the Wells, Ramirez, and Miyauchi purses and the watch taken from Miss Mitchell, although not in connection with any of the crimes (Rep. Tr. 719, 721-722, 724-727). By the beginning of the interrogation on February 5, which produced the confession, the case against Stewart had focused to the point that Sergeant Logue opened the session by stating: "Roy, you killed that old woman" (Rep. Tr. 789).

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[21] In his closing argument, the prosecuting attorney referred to the confrontation with Lena Franklin as "an accusatory circumstance" (Rep. Tr. 1099).

(2) *Stewart was in custody.*

Danny Escobedo was in custody perhaps five hours before his confession was elicited; Roy Stewart was in custody five days.[22]

(3) *The police engaged in a process of interrogations lending itself to eliciting incriminating statements.*

As in *Escobedo,* the Los Angeles Police were obviously out to "get" Stewart to confess his guilt. Beginning with the first interrogation on the night of the arrest, Sergeant Logue and the other officers leaned hard on Stewart for a confession. There is no indication that he was ever told that he was not required to answer their questions; they led him to believe they had the "goods" on him;[23] they confronted him with Lena Franklin, who accused him of cashing the Wells checks; they hinted at leniency if he would "straighten things out."[24] This was not general questioning about an unsolved crime; nor was it questioning intended to give Stewart an opportunity to explain suspicious circumstances. *Cf. Gallegos* v. *Nebraska,* 342 U.S. 55, 71 (Jackson, J., concurring).

Then there is the matter of the length of the interrogations. As the California Supreme Court concluded: "Such

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[22] Custody is an element of arrest by definition under California Penal Code § 834.

[23] "Now, we've got a pretty fair idea of what you've been doing. . . . [D]on't argue with us about what we know and what we can prove, you see—you see my point?" (Rep. Tr. 1036). And after a denial, "You know we're gonna be able to prove differently, don't you?" (Rep. Tr. 1037).

[24] "And feeling sorry for what happened, you know, means a great deal to a great many people that you're going to be coming in contact with" (Rep. Tr. 1035).

extensive interrogations during the period of [Stewart's] incarceration could serve no other purpose than to elicit incriminating statements." 62 Cal. 2d at 579, 400 P.2d at 102.

C. Stewart Did Not Waive His Right to the Assistance of Counsel, and His Confession Is Therefore Inadmissible Against Him at Trial.

Once it is established that the adversary process had begun to operate against Stewart as an accused person, and his constitutional right to counsel had come into play, the remaining question is whether his right was denied at the time the confession was elicited. In the absence of the aid and advice of a lawyer, the question here becomes one of waiver. For once the right to counsel is established, the accused is entitled to the help of a lawyer at "every step in the proceedings against him." *Powell* v. *Alabama*, 287 U.S. 45, 69. Once established, the right continues until it is effectively waived.[25] See Note, 78 Harv. L. Rev. 143, 219 n. 11.

The first three factual circumstances cited in *Escobedo* —focus on the suspect, custody, and the beginning of the process of interrogation—are relevant to the first question: Did the right to counsel accrue? The final two circumstances—"the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent"—are relevant only to the

[25] Compare Rule 44, Fed. R. Crim. P., which enbodies the principle that the accused is entitled to have counsel representing him "unless he elects to proceed without counsel."

separate question of waiver. The California Supreme Court interpreted *Escobedo* correctly, we submit, when it said:

> "Only when the investigatory stage has become an accusatory one, that is, when it has begun to focus on a particular suspect, the suspect has been taken into police custody, and the police have carried out a process of interrogations that lends itself to eliciting incriminating statements, does the doctrine of *Escobedo* apply and the confession given without the required warning *or other clear evidence of waiver* become inadmissible evidence." *People* v. *Dorado*, 62 Cal. 2d 338, 354, 398 P. 2d 361, 371. [Emphasis added.]

Guidelines for establishing waiver of the right to counsel pre-date *Escobedo*. The test of an effective waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464. Failure to request counsel will not be deemed a waiver, nor will waiver be presumed from a silent record. This was made clear in *Carnley* v. *Cochran*, 369 U.S. 506, 516:

> "Presuming waiver [of the right to counsel] from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

And see *Johnson* v. *Zerbst*, *supra* at 464; Note, *The Right of an Accused to Proceed Without Counsel*, 49 Minn. L. Rev. 1133, 1138-45 (1965).

In *Escobedo*, waiver presented an interesting question which divided the Court. In his dissenting opinion, Mr.

Justice White said: "Danny Escobedo knew full well that he did not have to answer and knew full well that his lawyer had advised him not to answer." 378 U.S. at 495, 499. The Court concluded, on the other hand, that Escobedo had not made a waiver because "[a]lthough . . . there is testimony in the record that petitioner and his lawyer had previously discussed what petitioner should do in the event of interrogation, there is no evidence that they discussed what petitioner should, or could, do in the face of a false accusation that he had fired the fatal bullets." *Id.* at 485 n.5. The question of waiver was thus complicated by the fact that Escobedo had retained a lawyer, had been advised by his lawyer not to say anything, had made a request to see his lawyer, and yet answered the police's questions in disregard of the advice of his lawyer.

The question of waiver is much simpler here. We seem to have the "narrower matter" referred to by Mr. Justice White in his *Escobedo* dissent. *Id.* at 499. Here there is no possible basis for a finding of waiver. A knowing and intelligent waiver presupposes knowledge of the right to counsel, and a finding of such knowledge is not possible on this record. There is no suggestion that Stewart was advised by his interrogators or anyone else of his right to counsel, or of any other rights that counsel would protect, especially the right to remain silent and the right to be taken before a magistrate without unnecessary delay.[26]

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[26] At the trial police officers testified in detail about the various conversations with Stewart; there was never any suggestion that they advised Stewart of any of his constitutional rights, although on a number of occasions the officers were asked to relate everything, or indicated that they related everything, that was said in the conversations (Rep. Tr. 716-718, 969-973 (night of January 31, 1963), 718 (morning of February 1, 1963), 719-720 (after-

Yet the State seems to urge this Court to find that Stewart made a knowing waiver of his constitutional rights. Petitioner's Opening Brief 40-41, 45, 50. We have sorted out what appear to be four different arguments by the State on waiver:

(1) Stewart is a cunning criminal, "cunning enough to use his hands and feet as his principal weapons, cunning enough to leave no fingerprints. . . . " etc., and that this presumably makes him cunning about his constitutional rights. *Id.* at 40. Aside from assuming Stewart's guilt, which the State cannot do when the question is the admissibility of a confession upon which the guilty verdict rests, the argument is about as valid as saying that a good constitutional lawyer necessarily qualifies as a cunning street robber.

(2) At trial Stewart said he would "rather not answer" a question on cross-examination about what he had in mind in telling the officers that if he could talk to Lillian Lara he might have something to tell them, and "when the judge directed him to answer, he flatly refused to comply." *Id.* at 40-41. The State concludes from this: "Since Stewart was sufficiently firm to defy the judge and the district attorney in open court, he must surely have known that he did not have to respond to questioning by the police." *Id.* at 41. What the State fails to point out is that Stewart did not refuse to answer the question until after the trial court told him that if he refused to answer there was nothing the court

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noon of February 1, 1963), 720-721 (morning of February 3, 1963), 721-722 (February 3, 1963), 723-725 (morning of February 4, 1963), 725-727 (afternoon of February 4, 1963), 727, 733-746, 963 (morning of February 5, 1963)).

was going to do about it[27] (Rep. Tr. 859). Moreover, between the time of the interrogations in the police station and the trial, it is reasonable to infer that Stewart consulted with the lawyer who represented him at trial and was advised of his rights (Clk. Tr. 11).

(3) Stewart had two prior felony convictions, during the course of which he presumably learned of his right to counsel and his right to remain silent during police interrogation. Petitioner's Opening Brief 50. It is inconceivable that a finding of knowledge of such constitutional rights would be made on the bare facts that at 18 Stewart was convicted of possession of one marijuana cigarette and at age 23 of robbery in the second degree. There is no evidence whether or in what manner he was advised of his constitutional rights on those occasions or that he remembered at the time of his arrest in 1963 whatever he may have been told years earlier. Moreover, there is no showing that he was advised of the risks of proceeding without counsel,

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[27] The colloquy was as follows:

"Q. And what something did you have in mind about telling Sergeant Logue if you could see Lillian?

"A. Well, I rather not answer that.

* * *

"THE COURT: I think counsel is entitled to an answer, Mr. Stewart.

"THE WITNESS: Well, er—can I answer—maybe I had several things in mind to tell her.

* * *

"THE COURT: Mr. Stewart, I think counsel is within his rights to expect an answer. Now, if you refuse to answer the question there is nothing I am going to do about it. Do you refuse to answer it?

"THE WITNESS: I refuse to answer it.

"THE COURT: That is all I can do. That will be all. Let us proceed" (Rep. Tr. 858-859).

such as the fatal consequences of the felony-murder doctrine. *Cf. Escobedo* v. *Illinois,* 378 U.S. 478, 485 n.5; *Carnley* v. *Cochran,* 369 U.S. 506, 511.

(4) Since the voluntariness of Stewart's confession was in issue at trial, and ignorance of rights is relevant, "surely that fact, if it was a fact, would have been brought out during the course of his own testimony." Petitioner's Opening Brief 50. This argument, we submit, is specious; it runs directly contrary to the teaching of *Carnley* v. *Cochran,* 369 U.S. 506, 516, that waiver will not be presumed from a silent record.

D. Stewart's Right to Counsel Did Not Depend on a Request.

The State urges this Court to distinguish the present case from *Escobedo* on the ground that Stewart made no request to consult with counsel and Escobedo did. Petitioner's Opening Brief 33, 36-38. This argument conflicts sharply with established constitutional principles and should be rejected by this Court just as it has been rejected by many courts interpreting and applying *Escobedo,*

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[28] *E.g., United States* ex rel. *Russo* v. *New Jersey,* 351 F.2d 429, 437 (C.A. 3); *Collins* v. *Beto,* 348 F.2d 823, 830 (C.A. 5); *Wright* v. *Dickson,* 336 F.2d 878, 882 (C.A. 9); *United States* ex rel. *Netters* v. *Rundle,* 246 F. Supp. 540, 542 (E.D. Pa.); *United States* ex rel. *Kemp* v. *Pate,* 240 F. Supp. 696, 707 (N.D. Ill.); *Galarza Cruz* v. *Delgado,* 233 F. Supp. 944, 948 (D.P.R.); *People* v. *Dorado,* 62 Cal. 2d 338, 398 P.2d 361, *cert. den.* 381 U.S. 937; *State* v. *Hall,* 88 Id. 117, 129-31, 397 P.2d 261, 268-69 (concurring opinion); *State* v. *Neely,* 239 Ore. 487, 500-03, 398 P.2d 482, 486-87; *State* v. *Dufour,* 206 A.2d 82, 85 (R.I.); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure,* Criminal Justice In Our Time 79-81 (1965); Comment, 53 Calif. L. Rev. 359-361 (1965); Note, 78 Harv. L. Rev. 143, 219 (1964); see also Comment, 73 Yale L.J. 1000, 1053 (1964). It has been suggested that those cases in which *Escobedo* is distinguished on

and by various commentators.[28] The California Supreme Court correctly interpreted *Escobedo* when it stated: "[T]he constitutional right does not arise from the request for counsel but from the advent of the accusatory stage itself." *People* v. *Dorado*, 62 Cal. 2d 338, 357, 398 P. 2d 361, 373.

Escobedo established the assistance of counsel as a constitutional requirement once the accusatory stage is reached. And as the Court said in *Carnley* v. *Cochran*, 369 U.S. 506, 513, " . . . it is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." See also *Uveges* v. *Pennsylvania*, 335 U.S. 437. And the teaching of *Gideon* v. *Wainwright*, 372 U.S. 335, is that an accused who is indigent must be provided with appointed counsel whenever he has a constitutional right to retain counsel. *Cf. Griffin* v. *Illinois*, 351 U.S. 12; *Douglas* v. *California*, 372 U.S. 353.

To make the right to counsel turn on a request, as the State urges, would favor the professional criminal over the amateur, the sophisticated and the financially able over the ignorant and the poor. The California Supreme Court made the point eloquently:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional

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the absence of a request probably represent a basic disagreement with this Court's decision and its underlying rationale. Note, *The Curious Confusion Surrounding* Escobedo *v.* Illinois, 32 U. Chi. L. Rev. 560, 561 (1965). And see Kamisar, *supra* at 57-58.

> rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." *People* v. *Dorado,* 62 Cal. 2d at 351, 398 P. 2d at 369-70.

A request might bear on the question of knowing waiver because it indicates knowledge of the right to counsel. See *Wright* v. *Dickson,* 336 F. 2d 878, 882 (C.A. 9). As already mentioned. Escobedo's request to consult with his lawyer complicated the waiver issue in that case; but when, as here, there is no evidence that the accused knew of his right to the assistance of counsel, his silence cannot be used as evidence of a knowing waiver.

In conclusion, *Escobedo* v. *Illinois,* when coupled with *Carnley* v. *Cochran,* provides ample authority for affirming the judgment of the California Supreme Court reversing Stewart's conviction.

E. The Contention of Petitioner and Others That Escobedo and Its Progeny Will Unduly Impede Law Enforcement Has No Demonstrable Support.

Petitioner, along with many public officials, has sounded the alarm that this Court's decisions vindicating safeguards of individual liberty will shackle the police and send crime rates soaring. Petitioner's Opening Brief 46-48. See the remarks of District Attorney Hogan quoted at New York Times, Dec. 2, 1965, p. 1, col. 2; Parker, *A Lawman's Lament,* 40 L.A. Bar Bull. 603 (1965). We submit that such contentions cannot withstand careful scrutiny.

As Professor Sutherland has observed, the statistics offered as evidence of an increasing "crime rate" are susceptible of many interpretations, not the least plausible of which is that in recent years the methodology of the record keepers has shown marked improvement. Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21, 32-34 (1965). Moreover, whether the "crime rate" is or is not increasing, determining the causes of crime presents one of the most complex problems faced by society; whether the decisions of this Court or of any court have any discernible effect upon the incidence of crime is an imponderable question. *Id.* at 34.

If one considers only the narrower question of the impact of *Escobedo* upon the rate of conviction of accused persons, one finds the evidence no more compelling. Law enforcement officials are in sharp disagreement as to the importance of confessions in criminal prosecutions.[29]

Finally, it may be that the supposed restrictions on legitimate police practices may prove more illusory than real. Perhaps some of the concern arises from too broad a read-

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[29] Compare the views of Professor Inbau (Inbau, *Law Enforcement, the Courts, and Individual Civil Liberties,* CRIMINAL JUSTICE IN OUR TIME 100-17 (1965)) and Dean Barrett (Barrett, *Police Practices and the Law—From Arrest to Release or Charge,* 50 Calif. L. Rev. 11 (1956)) with those of Judge Edwards (New York Times, Dec. 7, 1965, p. 33, col. 6). Nor is there agreement on the question whether the presence of lawyers during police interrogations would impede criminal investigation or would facilitate the criminal process. See Comment, 73 Yale L.J. 1000, 1049 (1964). It may also be that information produced under such circumstances might be more reliable than that produced by the methods described with remarkable candor by Messrs. Inbau and Reid. See Professor Sutherland's discussion of the confessions obtained in the *Whitmore* case, Sutherland, *supra* at 37-39. Inbau and Reid, *Criminal Interrogation and Confessions* (1962), is a comprehensive manual of modern interrogation techniques.

ing of the Court's opinion in *Escobedo*. That case does not, it would seem, prohibit the admission of spontaneous confessions. See Mr. Chief Justice Traynor's discussion of the "compulsion to confess" in *People* v. *Garner*, 57 Cal. 2d 135, 163, 367 P.2d 680, 697 (concurring opinion). A confession made at the scene of the crime to the husband of the victim may be admissible. *People* v. *Cotter*, 63 Adv. Cal. 404, 405 P.2d 862. Similarly, where a defendant calls the police to offer a confession, such confession apparently is not rendered inadmissible by a failure to advise defendant of his right to counsel. *People* v. *Jacobson*, 63 Adv. Cal. 335, 405 P.2d 555. *Escobedo* may not prohibit police officers from asking persons found in suspicious circumstances to explain their presence and conduct. *United States* v. *Konigsberg*, 336 F.2d 844 (C.A. 3). Perhaps the most crucial prerequisite to the operation of the *Escobedo* rule is that the police be engaged in a process of interrogation that lends itself to incriminating statements. Thus, statements made in the course of conversations which are not essentially adversary proceedings may be admissible. *People* v. *Modesto*, 62 Cal. 2d 436, 398 P.2d 753.

Admittedly, it may not always be easy, at least until the guidelines become more detailed, for the police or for the courts to determine when such a process of interrogation begins. Some difficulties may be presented in defining with precision when an investigation begins to "focus" on a particular suspect and under what circumstances an interrogation is designed to elicit a confession. Enker & Elsen, *Counsel for the Suspect:* Massiah *v.* United States *and* Escobedo *v.* Illinois, 49 Minn. L. Rev. 47, 69-77 (1964); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, Criminal Justice in Our

TIME 58-63 (1965). However, as the courts proceed to amplify the doctrine, as the California Supreme Court did in the present case,[30] many of these uncertainties will disappear.

Moreover, there are available to law enforcement authorities effective procedures which are compatible with the constitutional command of *Escobedo*. One feasible alternative is to provide counsel for accused persons held in custody. Public defender systems might be expanded to provide counsel for indigent suspects at the time they are taken to a police station. In other cases suspects may knowingly and intelligently waive the right to counsel and the right to remain silent. Probably the most satisfactory procedure would be promptly to take the suspect before a magistrate and initiate formal judicial proceedings. This procedure would bring state practice into line with the federal practice under the so-called *McNabb-Mallory* rule. *McNabb* v. *United States*, 318 U.S. 332; *Mallory* v. *United States*, 354 U.S. 449. It has long been recognized that the federal practice has not impeded substantially the efficacy of federal law enforcement agencies. See Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 Iowa L. Rev. 175, 180-82 (1952). See also the discussion of Mr. Justice Tobriner in *People* v. *Dorado*, 62 Cal. 2d 338, 355-56, 398 P.2d 361, 372.

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[30] After concluding that the requirements of "focus" on a particular suspect and holding the suspect in "custody" would normally be satisfied under California practice when a suspect is arrested, the California Supreme Court continued, "To determine if the police are carrying out 'a process of interrogation that lends itself to eliciting incriminating statements' " it would be necessary to consider "such factors as the length of the interrogation, the place and time of the interrogation, the nature of the questions, the conduct of the police and all other relevant circumstances." 62 Cal. 2d at 577-579, 400 P.2d at 101-102.

By promoting such police procedures, *Escobedo* should discourage abuses of police power, a prime example of which is the unlawful five-day detention of Roy Stewart and the four others arrested with him. Furthermore, if the presence of counsel in the jailhouse would serve to inhibit the intimidations and subtle coercions which require the exclusion of "involuntary" confessions, a by-product of the *Escobedo* rule may be the elimination of the murky inquiry into the effect of subtle psychological pressure brought to bear on accuseds of low intelligence and little education. See, *e.g., Haynes* v. *Washington,* 373 U.S. 568; *Culombe* v. *Connecticut,* 367 U.S. 568; *Spano* v. *New York,* 360 U.S. 315; *Leyra* v. *Denno,* 347 U.S. 556.

Critics of *Escobedo* claim that its force will be to render certain criminals unconvictable. *E.g.,* District Attorney Hogan's remarks, New York Times, Dec. 2, 1965, p. 1, col. 2. Perhaps the loudest cries of anguish come from those critics who have as yet little experience operating under *Escobedo.* Federal law enforcement agencies have operated for many years under similar requirements (Hoover, *supra*), and many foreign jurisdictions have long accepted comparable requirements as essential to the operation of a civilized judicial system. See Mr. Justice Frankfurter's discussion in *Culombe* v. *Connecticut,* 367 U.S. 568, 587-98; Devlin, *The Criminal Prosecution in England* 31-50 (1958). Indeed, even some staunch critics of recent court decisions have been forced to admit that the *Escobedo* rule is not as burdensome as had been feared.[31]

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[31] Mr. Richard Sprague, of the office of the district attorney of Philadelphia, has commented, "I hate to admit it but on the basis of our early reports we haven't lost a single confession, except to racket men and hardened criminals, who never talk anyway." New York Times, Nov. 20, 1965, p. 1, col. 5. See also the remarks of the Los Angeles County District Attorney. Los Angeles Times, Oct. 2, 1965, p. 1, col. 3.

Far more important, however, is that even if the operation of the *Escobedo* rule does permit some criminals to go unpunished, such a result is not adequate justification for ignoring constitutional safeguards. As Mr. Justice Clark said in *Mapp* v. *Ohio*: "The criminal goes free, if he must, but it is the law that gets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." 367 U.S. 643, 659. The authors of the Constitution wisely struck the balance in favor of individual liberty in sensitive areas involving the awesome power of the state. The occasional release of the guilty is the price gladly paid to preserve the blessings of our constitutional system of government.

II.

The Respondent's Confession Was Inadmissible Because It Was Elicited While He Was Being Deprived of His Liberty Without Due Process of Law.

As an alternative ground for affirming the judgment of the California Supreme Court, we urge that the incarceration of Stewart for five days constituted a detention without legal authority and was, therefore, a deprivation of liberty without due process of law in violation of the Fourteenth Amendment. As such, it renders inadmissible the confession elicited from Stewart during the illegal detention.

The authority of police officers in California to hold a person in custody following arrest is sharply limited. They must "in all cases" take such a person before a magistrate "without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays

. . . . " California Penal Code § 825. See also § 849. An officer, moreover, "who willfully delays to take such person before a magistrate . . . is guilty of a misdemeanor." California Penal Code § 145.

The record in this case shows that Stewart and four other persons were arrested and jailed for five days. Only on the fifth day, after the police had elicited from Stewart a confession to one of many crimes about which he had been interrogated, was Stewart taken before a magistrate and the other four released. The detention was thus a brazen violation of the California statutes limiting police authority to detain arrested persons. We submit that such illegal incarceration deprived Stewart of his liberty without *any* process of law, much less without due process of law. The Fourteenth Amendment expressly and unambiguously proscribes such an abuse of state power.

The unconstitutionality of the police detention in this case is not dependent upon a recognition of the so-called *McNabb-Mallory* doctrine (*McNabb* v. *United States,* 318 U.S. 332; *Mallory* v. *United States,* 354 U.S. 449) as a principle of constitutional dimension. Nor do we question the constitutionality of the California statute authorizing police to detain arrested persons for a limited period.[32] Our contention is simply that where, as here, the police exceed all authority—constitutional, statutory or otherwise —to detain a suspect, such unauthorized police action, depriving a person of his liberty, runs afoul of the Fourteenth Amendment.

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[32] The standards established in *McNabb* and *Mallory* may, of course, be helpful in determining the constitutionality of a state statute authorizing police detention of accuseds beyond a certain minimum period. Compare Rule 5(a), Fed. R. Crim. P.

To many suspects subjected to prolonged detention, the impression must necessarily be conveyed that their incommunicado imprisonment will continue until such time as the interrogating officers obtain the cooperation they seek. *Cf. Malloy* v. *Hogan,* 378 U.S. 1, 8. See Enker & Elsen, *Counsel for the Suspect*: Massiah *v.* United States *and* Escobedo *v.* Illinois, 49 Minn. L. Rev. 47, 84 (1964). It seems indisputable that as the period of detention and interrogation lengthens the psychologically coercive potentialities are enhanced. Any incriminating statements elicited in such a hostile atmosphere are both inherently coercive and antipathetic to a system that looks unfavorably upon practices characteristic of the "third degree." *McNabb* v. *United States,* 318 U.S. 332, 343-44.

Once it is recognized that the unauthorized five-day detention of Stewart deprived him of his liberty without due process of law, it necessarily follows that the only effective deterrent to such unconstitutional police behavior is to exclude any inculpatory statement elicited during the period of unlawful detention. This Court in the landmark case of *Mapp* v. *Ohio,* 367 U.S. 643, 656, recognized that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States, supra* at 217." This Court has reaffirmed the exclusionary rule in both federal and state criminal proceedings. *Wong Sun* v. *United States,* 371 U.S. 471; *Escobedo* v. *Illinois,* 378 U.S. 478; *Traub* v. *Connecticut,* 374 U.S. 493; *Ker* v. *California,* 374 U.S. 23.

The result sought here is compelled by this Court's decision in *Wong Sun* v. *United States,* 371 U.S. 471. See also

Traub v. *Connecticut*, 374 U.S. 493. In *Wong Sun* federal narcotics agents broke into petitioner's [Toy's] house and arrested him without probable cause, and, while still in his bedroom, elicited from him certain incriminating statements. This Court reversed the conviction of the trial court, which had accepted into evidence the bedroom statements, holding, *inter alia*, that those statements were constitutionally inadmissible at trial because they were the product of an illegal arrest of the accused. In the present case, the confession of Stewart was clearly the product of an illegal detention.

In both cases, then, the statements of the accused were the fruits of illegal police conduct. Surely, the unlawful imprisonment of Stewart is no less repugnant to our constitutional system of government than the unlawful invasion of Toy's privacy. Our system of criminal justice cannot countenance illegal police conduct, regardless of form, without inevitably undermining the rule of law. As Mr. Justice Brandeis, dissenting, said in *Olmstead* v. *United States*, 277 U.S. 438, 485:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

The evils sought to be avoided are well illustrated in the present case. For the entire five-day period of incarceration Stewart had no available means to secure his release. He had no opportunity to obtain temporary release through bail procedures prior to appearing before a court or magistrate. It is, in addition, implausible to impute to Stewart,

unrepresented as he was, a workable knowledge of his right of habeas corpus, which is guaranteed by Article I, section 9 of the Constitution.

Recognition of unauthorized police detention as a deprivation of one's liberty without due process, rendering inadmissible any confession elicited during the unlawful period, should raise the level of state police treatment of criminal suspects to the minimum procedural standards now demanded in the federal courts as a result of *McNabb* and its progeny. It should deter excessive detention on the basis of mere suspicion, an intolerable invasion of the citizen's fundamental right to liberty and freedom from unlawful seizure. It should deter mass arrests, such as occurred in the present case. It should minimize the opportunity and temptation for law enforcement officers to resort to inquisitorial methods we have long since rejected. It should reinforce our commitment to a federal system of government by eliminating the undermining effect of the arbitrary differences in treatment accorded federal and state defendants. See *Mapp* v. *Ohio*, 367 U.S. 643, 657-58; *Elkins* v. *United States*, 364 U.S. 206, 221; Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 588-93 (1962). Mr. Justice Douglas, in his concurring opinion in *Watts* v. *Indiana*, 338 U.S. 49, 57, forewarned that prompt arraignment must be a safeguard of constitutional proportion:

> "Detention without arraignment is a time-honored method for keeping an accused under the exclusive control of the police. They can then operate at their leisure. The accused is wholly at their mercy. He is without the aid of counsel or friends; and he is denied the protection of the magistrate. We should unequivocally condemn the procedure and stand ready to outlaw

> . . . any confession obtained during the period of unlawful detention. The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country."

MOTION

The Writ of Certiorari Should Be Dismissed Because the Judgment Below Is Not "Final."

The jurisdiction of this Court has been invoked under the provisions of 28 U.S.C. § 1257(3), which provides for review by this Court, by writ of certiorari, of certain "final judgments or decrees" rendered by the "highest court of a State in which a decision could be had." It is submitted that the judgment presented for review here is not a "final judgment or decree" within the meaning of that section of the Code.

The California Supreme Court simply and without qualification "reversed" the judgment of the trial court. As this Court observed in *Gospel Army* v. *Los Angeles,* 331 U.S. 543, 546, "In California an unqualified reversal, 'that is to say, without direction to the trial court,' is effective to remand the case 'for a new trial and places the parties in the same position as if the case had never been tried.' [Citations omitted.]" That continues to be the law in California. *E.g., People* v. *Murphy,* 59 Cal. 2d 818, 833, 382 P.2d 346, 356; *Hall* v. *Superior Court,* 45 Cal. 2d 377, 289 P.2d 431; 4 Cal. Jur. 2d, Appeal and Error, §§ 683-684.[33]

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[33] *Richfield Oil Corp.* v. *State Bd. of Equalization,* 329 U.S. 69, does not state any different California rule. "Although the Supreme Court [of California] reversed the judgment of the trial

Where, as here, "the effect of the state court's direction is to grant a new trial, the judgment will not be final" for purposes of review in this Court. *Gospel Army* v. *Los Angeles, supra* at 546. See also *Southern Pac. Co.* v. *Gileo,* 351 U.S. 493, 496; *Laclede Gas Light Co.* v. *Public Service Comm.,* 304 U.S. 398; *Cincinnati Street R. Co.* v. *Snell,* 179 U.S. 395. When a defendant in a criminal case is seeking appellate review, the rule of finality is sometimes articulated in terms of whether the proceedings have yet reached the point at which the accused has been sentenced and his sentence, or at least his conviction, is subject to no further direct review below. *Berman* v. *United States,* 302 U.S. 211; *Parr* v. *United States,* 351 U.S. 513, 518; *Brady* v. *Maryland,* 373 U.S. 83, 85 n.1. When it is the prosecution seeking the appellate review of a criminal case, that rule would seem to translate into terms of whether the proceedings have yet reached the point at which the accused has been acquitted and the acquittal is subject to no further direct review below. See, *e.g., Pennsylvania* v. *Nelson,* 350 U.S. 497, *affirming Nelson* v. *Commonwealth,* 377 Pa. 58, 104 A.2d 133; *cf. Andrews* v. *United States,* 373 U.S. 334. In the present proceedings, the judgment of the California Supreme Court, neither in words nor effect, directs an acquittal; it rather puts both the accused and the prosecution "in the same position as if the case had never been tried." *Erlin* v. *National Union Fire Ins. Co.,* 7 Cal. 2d 547, 549, 61 P.2d 756, 757.

It is, of course, recognized that the Court gives the finality provision of 28 U.S.C. § 1257 a "practical rather

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court without direction, its decision controls the disposition of the case" because "the facts have been stipulated and the Supreme Court of California has passed on the issues which control the litigation . . . . " 329 U.S. at 73. See also *Pope* v. *Atlantic Coast Line R. Co.,* 345 U.S. 379, 382.

than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546. And see *Local No. 438* v. *Curry*, 371 U.S. 542; *Radio Station WOW* v. *Johnson*, 326 U.S. 120. Those and other related cases recognize the concept that there are some judgments which fall into "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp., supra* at 546.

But this is not such a case.[34] The claim of the State that Stewart's confession is admissible into evidence, if it be a "claim of right" at all, is not one which has yet been "finally determined" by the California courts. The state courts have not yet even given their "final word" (*Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551) on the question whether or not the confession is admissible against Stewart under the doctrine of *Escobedo* and *Dorado*. Upon retrial the prosecution may be able to establish that Stewart waived his right to counsel before he confessed. See *People* v. *Aranda*, 63 Adv. Cal. 542, 552, 407 P.2d 265, 270; *People* v. *Bilderbach*, 62 Cal. 2d 757, 401 P.2d 921.

Moreover, even if the California Supreme Court erred in interpreting the constitutional teachings of *Escobedo*, that court has not "finally determined" whether Stewart's confession was nevertheless inadmissible because involuntary. The court below did not "probe the problem raised by

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[34] "The only decision of this Court applying to a criminal case the reasoning of *Cohen* v. *Beneficial Loan Corp.* . . . held that an order relating to the amount of bail to be exacted falls into this category. *Stack* v. *Boyle*, 342 U.S. 1." *Carroll* v. *United States*, 354 U.S. 394, 403.

Jackson v. *Denno* (1964), 378 U.S. 368," but rather chose to leave the issue of the involuntariness of the confession to further proceedings upon re-trial.[35] 62 Cal. 2d at 576 n.3, 400 P.2d at 100 n.3. See also *People* v. *Aranda, supra.*

Thus, while the questions presented here by the State may be "serious and unsettled question[s]" (*Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 547), this Court's ruling on them at this time is not "fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U.S. 373, 377). Nor are the State's questions "independent of, and unaffected by" (*Radio Station WOW* v. *Johnson*, 326 U.S. 120, 126) what may transpire upon re-trial.[36] Indeed, they can be "mooted" (compare *Brady* v. *Maryland*, 373 U.S. 83, 85 n.1) by the further state court proceedings if, for example, Stewart prevails on the reserved issue of the involuntariness of his con-

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[35] The trial court did not make a determination in the absence of the jury that Stewart's February 5 confession was voluntary. The record shows that the court heard the tape recording of the confession outside the presence of the jury and found it to be "intelligible and discernible" and that the transcription of the tape was "accurate" (Rep. Tr. 361, 728-730). Apparently the defense counsel made no objection to the admission of the confession into evidence (Rep. Tr. 728-745). The record shows that outside the presence of the jury the prosecuting attorney stated to the court that the contention was being made by the defense that the confession was "induced by certain promises made by the Sergeant" (Rep. Tr. 876). The trial court instructed the jury that it should not consider "any admission or confession of the defendant unless such statement was voluntarily made" and gave instructions on definitions of confession and admission and when an admission or confession is involuntary (Supp. Clk. Tr. 11-13).

[36] *Cf. DiBella* v. *United States*, 369 U.S. 121, 127; *Cogen* v. *United States*, 278 U.S. 221, 223.

fession,[37] or the prosecution establishes that Stewart made a knowing and intelligent waiver of his right to counsel.

Furthermore, the fact that petitioner *may*, ultimately, *finally* lose in the state courts on the issue of the admissibility of Stewart's confession does not render the present judgment "final." That is so even if the inadmissibility is established in the context of a re-trial ending in an acquittal, and the State's present claims thereby are "swallowed up in the sanctity of the jury's verdict." *Carroll* v. *United States*, 354 U.S. 394, 406. See also, *DiBella* v. *United States*, 369 U.S. 121, 130. In *Carroll*, this Court held that a federal district court order granting a defense motion to suppress evidence in a criminal case was not appealable to the court of appeals because not a "final" order.[38] There the Government argued, "as it offered to stipulate below, that the effect of suppressing the evidence . . . will be to force dismissal of the indictment for lack of evidence on which to go forward." 354 U.S. at 405. The Court responded by observing that "appeal rights cannot depend on the facts of a particular case"; that "Congress necessarily has had to draw the jurisdictional statutes in

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[37] In this connection, it should be noted that petitioner's statement of each of the questions presented for review here involves an assumption that the prosecution has prevailed on that issue. Petitioner's Opening Brief 2.

[38] See also *DiBella* v. *United States*, 369 U.S. 121.

In *Carroll* and *Di Bella*, the Court was dealing with the question of the jurisdiction of the federal courts of appeals under 28 U.S.C. § 1291. The "final judgment" requirement of 28 U.S.C. § 1257, which is involved in the present case, has been treated by this Court as involving at least as much "finality" for purposes of this Court's jurisdiction over state court proceedings as the "final decision" requirement of 28 U.S.C. § 1291 involves for purposes of the jurisdiction of the courts of appeals over district court proceedings. See, *e.g.*, *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 123-124.

terms of categories"; and that the order suppressing evidence held by the prosecution did not fall into the statutory category of a "final decision." The holding of the California Supreme Court in the instant case is less "final" on the issue of admissibility of Stewart's confession than was the holding of the District Court in the *Carroll* case on the issue of the admissibility of the prosecution evidence there involved. Here, the prosecution may yet prevail on that issue and, in any event, may yet convict Stewart, whereas in *Carroll,* the Court assumed that the suppressed evidence would be unavailable to the Government and that the accused would be acquitted without such evidence.

It appears, therefore, that the judgment below is not "final" within the meaning of 28 U.S.C. § 1257(3).

Conclusion

For the foregoing reasons, the writ of certiorari should be dismissed as improvidently granted, or, in the alternative, the judgment of the California Supreme Court should be affirmed.[39]

Respectfully submitted,

WILLIAM A. NORRIS
Attorney for Respondent

Of Counsel:

TUTTLE & TAYLOR

February 3, 1966

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[39] Should this Court decide to remand the case to the California Supreme Court, still a further constitutional question would be presented under *Griffin* v. *California,* 380 U.S. 609. The prosecutor commented to the jury on Stewart's failure to testify on the counts charging him with robbing Mrs. Miyauchi, Mrs. Dixon and Miss Ramirez (Rep. Tr. 1107-1108, 1111). *Griffin* v. *California* was decided after the California Supreme Court decided *Stewart.*

APPENDIX A

Statutory Provisions Involved

California Penal Code:

"§ 189. All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

"§ 825. The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

"After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who willfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction."

"§ 849. (a) When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate.

(b) Any peace officer may release from custody, instead of taking such person before a magistrate, any person arrested without a warrant whenever:

(1) He is satisfied that there is no ground for making a criminal complaint against the person arrested. Any record of such arrest shall include a record of the release hereunder and thereafter shall not be deemed an arrest but a detention only.

(2) The person arrested was arrested for intoxication only, and no further proceedings are desirable.

(3) The person arrested was arrested for a misdemeanor, and has signed an agreement to appear in court or before a magistrate at a place and time designated, as provided in this code."

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IN THE

Supreme Court of the United States

October Term, 1965
No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

ROY ALLEN STEWART,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

REPLY TO MOTION TO DISMISS.

The appellate jurisdiction of this Court extends, and for nearly two hundred years it has extended, to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . ." (28 U.S.C. 1257.) In a dismissal motion appended to his brief, Stewart urges that the judgment herein is not "final." We take issue with his contention.

It may be conceded that the Stewart writ is virtually without precedent. Despite a diligent search, we have found no case in which this Court has granted certiorari to review a judgment of the highest court of a state reversing a criminal conviction upon grounds apart from the construction of a statute or some supposed

incompatibility between a state statute and federal law. But that fact affords no proof of improvidence. On the contrary, it is simply a product of the history of this Court.

Not until the present generation did this Court apply to the states any of the specific guarantees of the Bill of Rights pertaining to criminal cases. It was but one year ago that this Court applied the confrontation clause of the Sixth Amendment. (*Pointer v. Texas,* 380 U.S. 400.) It was but two years ago that this Court applied the self-incrimination clause of the Fifth Amendment. (*Malloy v. Hogan,* 378 U.S. 1.) It was but three years ago that this Court held that under the Sixth Amendment an indigent defendant is entitled to appointed counsel at the trial of a non-capital felony. (*Gideon v. Wainwright,* 372 U.S. 335.) It was but five years ago that this Court applied the federal exclusionary rule in aid of the Fourth Amendment. (*Mapp v. Ohio,* 367 U.S. 643.) The first state confession case was decided in 1936. (*Brown v. Mississippi,* 297 U.S. 278.) And the first case requiring the appointment of counsel at the trial of a capital charge is but four years older. (*Powell v. Alabama,* 287 U.S. 45.)

Each of the foregoing cases arose from the affirmance of a conviction or the denial of a post-conviction remedy. As mentioned earlier, this is the first case of its kind to arise from a reversal. If Stewart is correct, then the appellate jurisdiction of this Court is a one-way street, a road open to the accused but not to his accuser, a medium of expansion but not a channel of restraint.

We submit that there is no warrant in the statute for such an unfair and anomalous result. For were

this Court without power to review, at the behest of a state, a faulty construction of *Malloy*, or *Mapp*, or another, there would be no means to enforce in criminal cases that peremptory clause which reads: "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., Art. VI, Cl. 2. See *Martin v. Hunter*, 1 Wheat. 304 at 340-48; *Cohens v. Virginia*, 6 Wheat. 264 at 376, 381, 385, 413-23.)

It must be borne in mind that we are not challenging some interlocutory pre-trial order. (Compare *Carroll v. United States*, 354 U.S. 394 and *DiBella v. United States*, 369 U.S. 121.) Nor can there be any doubt that the scope of *Escobedo* is "ripe" for review. (*Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379 at 382; *Brown Shoe Co. v. United States*, 370 U.S. 294 at 309.) And it is clear that the "Dorado rule" involves very "serious public consequences" indeed. (*Radio Station WOW v. Johnson*, 326 U.S. 120 at 124.)[1]

We are told nevertheless that the questions in this case may not be reviewed and resolved in this Court because Stewart is to be retried and the course of the retrial may dispose of them forever. But this argument is based upon a series of premises irrelevant to the present posture of the case and which assume the issue of the litigation.

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[1]During 1964, the latest full year for which statistics are available, 32,801 felony defendants were processed in the California Superior Courts, 8,334 of them coming to trial. (Crime in California [1964], p. 121. Table V-8.) Commencing January 29, 1965, the California Supreme Court has upset 20 judgments of death on the basis of the "Dorado rule."

Conceding that the questions are "serious and unsettled,"[2] Stewart denies that they are "fundamental to the further conduct of the case,"[3] because the People might prove at the retrial that he waived his right to counsel. It is sufficient to say of this argument that Stewart is assuming the validity of his own position on the merits. Next he denies that the questions are "independent of, and unaffected by"[4] what may occur at the retrial, again, because the People might prove that he waived his right to counsel and, also, because he might prove that his confession was coerced. But if the latter point has been reserved, as Stewart says, this was not because the California Supreme Court conceived its decision as a mere intermediary ruling, a short pause for breath in the judicial process. On the contrary, the California Court deemed the "Dorado rule" to be controlling and both legally and logically prior to the question of coercion which it declined to consider. As to the "Dorado rule" and the "Stewart test," we face the last word of a court of last resort. That, we submit, should be enough to invoke the jurisdiction of this Court.

We recognize, of course, that under California law, an unqualified judgment of reversal sets a lawsuit at large and that, on one occasion at least, this Court has regarded the rule as a bar to further review. (*Gospel Army v. Los Angeles,* 331 U.S. 543 at 546, and cases

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[2]*Cohen v. Beneficial Loan Corp.,* 337 U.S. 541 at 547; *Brady v. Maryland,* 373 U.S. 83 at 85, fn. 1.

[3]*United States v. General Motors Corp.,* 323 U.S. 373 at 377; *Land v. Dollar,* 330 U.S. 731 at 734, fn. 2; *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682 at 685, fn. 3; *Brady v. Maryland,* 373 U.S. 83 at 85, fn. 1; *Gillespie v. U.S. Steel Corp.,* 379 U.S. 148 at 153-54.

[4]*Radio Station WOW v. Johnson,* 326 U.S. 120 at 126; *Brady v. Maryland,* 373 U.S. 83 at 85, fn. 1.

cited.) But our cause is not without portent, for a number of years after *Gospel,* this Court envisioned the propriety of what we seek to do and our right to seek to do it. Speaking for the majority in *Rogers v. Richmond,* 365 U.S. 534, at footnote 4 on pages 546-47, the late Mr. Justice Frankfurter said:

> "A different question was implicitly presented in *Stroble v. California,* 343 U.S. 181. In that case the trial judge permitted the confessions to go to the jury under instructions which told it to disregard them if it found that they were not voluntarily made, and which adequately defined the 'voluntariness' required by due process. See *Lyons v. Oklahoma,* 322 U.S. 596, 601. Thus, there was no flaw in the verdict rendered. *An erroneous legal standard for determining the admissibility of allegedly coerced confessions was interjected into the proceeding only at the level of the Supreme Court of California. Had the State Supreme Court, under similar circumstances reversed the conviction, not on the basis of local law but solely by reason of a misinterpretation of this Court's principles governing coerced confessions, and had the case been brought here for review on certiorari, the jury's verdict would have had to be reinstated.* In any event, the question presented in *Stroble* was not faced squarely, and in illuminating isolation, in that case. Compare *Lee v. Mississippi,* 332 U.S. 742, with *Stroble.*" (Emphasis added.)

A final word is in order. One salutary purpose of the first Judiciary Act and of its successor statutes was to protect this Court from untimely claims of er-

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FEB 1
JOHN F. DA

IN THE

Supreme Court of the United States

October Term, 1965.

PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,
No. 584. *v.*
ROY ALLEN STEWART, Respondent.
On Writ of Certiorari to the Supreme Court of the State of California.

ERNEST ARTHUR MIRANDA, Petitioner,
No. 759. *v.*
THE STATE OF ARIZONA, Respondent.
On Writ of Certiorari to the Supreme Court of the State of Arizona.

MICHAEL VIGNERA, Petitioner,
No. 760. *v.*
PEOPLE OF THE STATE OF NEW YORK, Respondent.
On Writ of Certiorari to the Court of Appeals of the State of New York.

CARL CALVIN WESTOVER, Petitioner,
No. 761. *v.*
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,
No. 762. *v.*
STATE OF NEW JERSEY, Respondent.
On Writ of Certiorari to the Supreme Court of the State of New Jersey.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1965.

PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner,*

No. 584. *v.*

ROY ALLEN STEWART, *Respondent.*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

INTEREST OF AMICUS.

The American Civil Liberties Union has engaged solely in the defense of the Bill of Rights for more than forty-five years. Much of its energies have been directed toward effectuating the provisions of the Bill of Rights concerned with the administration of criminal justice.

Effectuation of a man's right not to be compelled to incriminate himself is essential to the preservation of our accusatorial system of criminal justice. The American Civil Liberties Union believes that such effectuation can be achieved by proper application of this Court's decision in *Escobedo v. Illinois,* 378 U. S. 478 (1965). This is just the issue presented in these cases. The briefs for the parties have directed attention to the particular facts of each case. Your Amicus believes it can best serve the Court by presenting a more general argument addressed to the theory and application of *Escobedo.*[1]

1. The attorneys for the parties involved have consented to the filing of this brief. The letters of consent are on file with the Clerk.

SUMMARY OF ARGUMENT.

In *Escobedo v. Illinois*, 378 U. S. 478 (1965), this Court held that the privilege against self-incrimination was violated when an accused's confession was obtained through police in-custody interrogation designed to elicit incriminating statements from him at a time when he was denied the presence of counsel, since the presence of counsel was necessary to protect the constitutional privilege. In so holding, the Court reached the natural culmination of its "involuntary" confession decisions, in light of its application of the privilege against self-incrimination to the States. The determination that *Escobedo* rests upon effective enforcement of the privilege against self-incrimination is not of mere academic interest, but vitally affects the proper application of the decision.

There can be no doubt that police custodial interrogation designed to elicit a confession is inherently violative of the privilege against self-incrimination. Therefore confessions obtained under such circumstances cannot be constitutionally admitted in State or federal criminal proceedings unless it has been shown that adequate safeguards were present to protect the privilege. For reasons spelled out at length in the brief, under the present circumstances of police custodial interrogation designed to elicit a confession, the required safeguard is the presence of counsel.

A police warning of the subject's right to remain silent is not adequate. Neither is the granting of prior access to counsel, as distinguished from the presence of counsel. For these reasons it is immaterial that a subject of police custodial interrogation asked for or was able to obtain retained counsel. Effectuation of the privilege against self-incrimination, in these circumstances, requires the providing of counsel to all.

This does not mean that the effectuation of the privilege requires the presence of counsel in other than police

custodial interrogation designed to elicit a confession. Nor does it mean that if other protective devices are devised and put into effect which effectively secure the privilege even in the police custodial situation, the presence of counsel would still be required. A holding that, under the conditions of police interrogation as they normally exist today, the presence of counsel is necessary to protect the privilege against self-incrimination, should not foreclose a determination that other protective devices are acceptable when and if such devices are put into effective use.

Finally, the Court must reject the argument that the privilege against self-incrimination should not be enforced in the face of a police "need" for its non-enforcement. Even if such "need" conflicting with the privilege were shown to exist, the Constitution requires that the conflict be resolved in favor of effective enforcement of the constitutional privilege. However, this issue need not be reached as the asserted police "need" has not been shown to exist and the burden of production of evidence clearly rests on the prosecution. Not only have prosecutors not produced any convincing evidence, the assertions which they make are not even supported by considered legislative determinations of police need. Thus in a scale which opposes unsupported assertions of necessity by police and prosecutors on the one side, and effectuation of the individual's constitutional right not to be compelled to incriminate himself on the other, the balance must be struck on the side of the constitutional right.

ARGUMENT.

I.

Escobedo v. Illinois Held That the Privilege Against Self-Incrimination Was Violated by Obtaining a Man's Confession Through Police Interrogation Designed to Elicit Incriminating Statements at a Time When He Was in Custody and Was Denied the Presence of Counsel, Since Counsel Was Necessary to Dispel the Inherently Compelling Atmosphere of Such Interrogation.

A. The Facts and Setting of *Escobedo*.

The *Escobedo* opinion itself placed great emphasis on the facts of the case, and it is appropriate that the analysis of the implications of that decision begin with an examination of these facts. Danny Escobedo, a 22-year-old, of Mexican extraction, with no record of previous experience with the police, was arrested and taken handcuffed to police headquarters for interrogation in connection with the fatal shooting of his brother-in-law. Throughout the entire interrogation, Escobedo was repeatedly told that the police had convincing evidence that he had fired the fatal shots. During the interrogation he was cut off from all contact with the outside world despite his repeated requests to see his retained attorney, who was at the police station attempting to see him. Requests of both Escobedo and his attorney to see each other were continually denied by the police. At one point, Escobedo and his attorney came into each other's view for a few moments but the attorney was quickly ushered away. Escobedo overheard a detective telling his attorney that he could see Escobedo when they were finished interrogating him. During the entire interrogation Escobedo "was handcuffed" in a standing position, he "was nervous, he had circles under his eyes and

he was upset" and he was "agitated" because "he had not slept well in over a week."

Despite all this, Escobedo did not "crack" until confronted with an alleged accomplice who stated that Escobedo had fired the fatal shots. To this Escobedo replied that he hadn't shot the deceased, the accomplice had. In this way, Escobedo, for the first time, admitted to some knowledge of the crime. After that "crack", he made additional statements implicating himself in the murder plot. At this point an Assistant State's Attorney was summoned "to take" his statement. He was an experienced lawyer who was assigned to the homicide division to take "statements" from prisoners in custody and who "took" Escobedo's statement by asking carefully framed questions. Neither at this time nor at any other point in the interrogation had anyone warned Escobedo of his constitutional right not to be compelled to incriminate himself.

B. The Rationale of *Escobedo:* Effectuation of the Right Not to Be Compelled to Incriminate Oneself.

On these facts, this Court held that during his interrogation Escobedo had been denied "the Assistance of Counsel" in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment, and thus the incriminatory statement elicited during this interrogation could not be used against him at his criminal trial.

In holding that Escobedo had been denied his Sixth Amendment right to counsel the Court relied on the facts that he had been extensively interrogated where the "purpose of the interogation was to 'get him' to confess his guilt despite his constitutional right not to do so. At the time of his arrest and throughout the course of the interrogation, the police told [Escobedo] that they had convincing evidence that he had fired the fatal shots. Without informing him of his absolute right to remain silent in the

face of this accusation, the police urged him to make a statement." 378 U. S., at 485.

The facts of the case were, therefore, remarkably similar to these involved in *Bram v. United States,* 168 U. S. 532 (1897), where almost seventy years ago this Court held that such an incriminating statement had been elicited in violation of the suspect's Fifth Amendment right not to be compelled to incriminate himself. Indeed, the Court in *Escobedo,* 378 U. S., at 485-486, relied on and quoted the following language of *Bram:*

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that if he remained silent it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person, and it cannot be conceived that the converse impression would not also have naturally arisen, that by denying there was hope of removing the suspicion from himself." *Bram v. United States,* 168 U. S. 532, 562.

In discussing the significance of counsel during police interrogation of a suspect in custody, and the possible effect of counsel's presence on the alleged police "need" to obtain confessions, the Court stated: "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination." 378 U. S., at 488.

The Court went on to point out that "[w]e have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. As Dean Wigmore so wisely said:

> '*[A]ny system of administration which permits the prosecution to trust habitually to compulsory self-*

> *disclosure as a source of proof must itself suffer morally thereby.* The inclination develops to rely mainly upon such evidence, and to be satisfied with an incomplete investigation of the other sources. The exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture. If there is a right to an answer, there soon seems to be a right to the expected answer,—that is, to a confession of guilt. Thus the legitimate use grows into the unjust abuse; ultimately, the innocent are jeopardized by the encroachments of a bad system. Such seems to have been the course of experience in those legal systems where the privilege was not recognized.' 8 Wigmore, Evidence (3d ed. 1940), 309. (Emphasis in original.)" 378 U. S., at 488-89.

It thus seems clear that the Court held that Escobedo had been denied his right to the Assistance of Counsel because, under the circumstances of that case, providing counsel to Escobedo was necessary to protect effectively his basic right not to be compelled to incriminate himself. The fundamental quality of the privilege against self-incrimination is emphasized by considering the independent significance of the two rights. The privilege against self-incrimination is so central to our system of justice, that it is hard to conceive of our society without it; yet, it would seem fair to say that if there were no such privilege, *Escobedo* might well have come to a different result.[2] On

2. Put on a straight right to counsel approach, *cf., Massiah v. United States,* 377 U. S. 201 (1964), it might well be doubtful that police interrogation would constitute a "critical stage" absent the self-incrimination privilege. *Cf. White v. Maryland,* 373 U. S. 59 (1963); *Hamilton v. Alabama,* 368 U. S. 52 (1961). While it might be argued that, even absent the privilege against self-incrimination, *Escobedo* could still have been put on "involuntary" confession grounds, *cf. Haynes v. Washington,* 373 U. S. 503 (1963), it again seems doubtful that, absent the privilege, the "involuntary" confession cases would have proceeded to the point expressed in *Haynes.* See *Malloy v. Hogan,* 378 U. S. 1, 7 (1964).

the other hand, it seems clear that the absence of a right to counsel should have had no effect on the result; in the circumstances of *Escobedo*, the privilege against self-incrimination required the presence of counsel for its effectuation.

Such a marriage of the Fifth Amendment privilege and Sixth Amendment right to counsel (as made applicable by the Fourteenth Amendment) is not unique to *Escobedo*. The Court has often recognized the fact that the Assistance of Counsel is necessary to protect effectively other constitutional rights. For example, in *Ferguson v. Georgia*, 365 U. S. 570 (1961), the Court held that a defendant was denied the effective assistance of counsel when counsel was necessary in order to enforce effectively his right to testify on his own behalf. Similarly, in *Townsend v. Burke*, 334 U. S. 736 (1948), this Court held that a defendant had been denied the effective assistance of counsel at sentencing when the presence of counsel was necessary to protect him against the possibility that the prosecution had purposefully submitted misinformation to the sentencing judge. Of particular relevance to the problem of *Escobedo* is the long series of "involuntary" confession cases in which the Court has stressed the fact that the suspect did not have the assistance of counsel during the interrogation. See, e.g., *Chambers v. Florida*, 309 U. S. 227 (1940); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *Haley v. Ohio*, 332 U. S. 596 (1948); *Fikes v. Alabama*, 352 U. S. 191 (1957); *Spano v. New York*, 360 U. S. 315 (1959); *Culombe v. Connecticut*, 367 U. S. 568 (1961); *Gallegos v. Colorado*, 370 U. S. 49 (1962); *Haynes v. Washington*, 373 U. S. 503 (1963).

And, just this past Term, the Court merged a defendant's right to counsel with his right to be confronted with the witnesses against him. In *Pointer v. Texas*, 380 U. S. 400 (1965), the Court held that the use at trial of a transcript of a witness's testimony taken at a preliminary hearing at which the defendant did not have counsel violated the petitioner's right to confrontation because the

statement of the witness used "against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine" the witness. 380 U. S., at 407.

Similarly, the use of his confession against Escobedo at his trial violated his constitutional rights since it was taken at a time and under circumstances where the lack of the effective assistance of counsel rendered completely nugatory his right not to be compelled to incriminate himself.[3]

The difference between this approach to *Escobedo* and one that concentrates solely on an isolated right to counsel is not only of academic interest; it vitally concerns the proper application of the decision. The view that concentrates on the right to counsel necessarily is directed to an inquiry as to when such right attaches. One way of approaching this is to attempt to discover a point in time or stage in the process for such attachment. Before that point is reached *Escobedo* has no application; after it is reached, *Escobedo* requires counsel. It is submitted that such an all or nothing approach may go both too far and not far enough. A rigid requirement of providing counsel under any and all circumstances after the crucial point in time is reached, may require the provision of counsel under circumstances where counsel is not necessary to the effectuation of a person's right not to be compelled to incrimi-

3. This, of course, does not mean that the Sixth Amendment right to counsel has no operative effect other than to enforce effectively other constitutional rights. It is clear that the Sixth Amendment does have independent operative effects both at trial, see *Gideon v. Wainwright*, 372 U. S. 335 (1963), and before trial, see *White v. Maryland*, 373 U. S. 59 (1963); *Hamilton v. Alabama*, 368 U. S. 52 (1961); *Massiah v. United States*, 377 U. S. 201 (1964); *McLeod v. Ohio*, 381 U. S. 356 (1965). It is submitted, however, that, in light of the analysis contained in this brief, it is not now necessary to determine the extent of this independent right to counsel beyond the situations represented by the above cases. *Cf. In re Newbern*, 55 Cal. 2d 508, 11 Cal. Rptr. 551, 360 P. 2d 47 (1961); *Winston v. Commonwealth*, 188 Va. 386, 49 S. E. 2d 611 (1948).

nate himself. Moreover, it might stifle desirable reform in State law or police practices aimed at the possibility of effectuating this right through means other than providing counsel. On the other hand the counsel-or-nothing approach may result in not providing adequate protection when it is found that the point in time at which the right to counsel attaches has not been reached, although the danger of compelled self-incrimination looms large. Indeed, the knowledge that counsel must be provided if this crucial point in time is found to have been reached may make courts reluctant to make such a finding when the assistance of counsel does not seem to be a feasible requirement. Yet, these may very well be cases where the effectuation of a person's right not to be compelled to incriminate himself requires protection, though protection other than through the assistance of counsel.[4]

Another possible counsel theory of *Escobedo* is an approach that makes the providing of counsel dependent upon the circumstances of the interrogation. If this view is taken, however, the issue then really becomes the effectuation, during the interrogation, of the Fifth Amendment right. This is just the approach advocated in this brief.

If, therefore, *Escobedo* rests upon effectuation of a person's right not to be compelled to incriminate himself, resolution of the issues here presented concerning its application require an analysis of this right and how it must be effectuated in the context of police investigation. We, therefore, turn to these issues.

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4. *Massiah v. United States,* 377 U. S. 201 (1964) apparently holds that indictment is an absolute point at which the right to counsel attaches. *Cf. McLeod v. Ohio,* 381 U. S. 356 (1965). The selection of indictment as an absolute point is, however, supportable on the basis of the theory of an indictment: that the government has prior to that time completed its investigation and made its basic case. Moreover, the accused's need for trial preparation—and the assistance of counsel therein—has then become established.

C. The Privilege Against Self-Incrimination in the Station House.

As this Court has only recently stated:

"[The privilege against self-incrimination] reflects many of our fundamental values and most noble aspirations: . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . .; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' . . .; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty' is often 'a protection to the innocent.'" *Murphy v. Waterfront Commission,* 378 U. S. 52, 55 (1964).

This Court has recognized "that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendent privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured. . . . The Fourteenth Amendment secures against State invasion the same privilege that the Fifth Amendment guarantees against federal infringement—*the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will.* . . ." *Malloy v. Hogan,* 378 U. S. 1, 7-8 (1964). (Emphasis added.)

There can be today no doubt that "the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will" applies in the context of police interrogation, state or federal. Almost seventy years ago this Court held in *Bram v. United States,* 168 U. S., at 542 (1897) that "[i]n criminal trials, in the Courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Cf. Shotwell Mfg. Co. v. United States,* 371 U. S. 341 (1963); *Albertson v. Subversive Activities Control Board,* 86 S. Ct. 194 (1965).

Although it was not until two years ago in *Malloy v. Hogan,* 378 U. S. 1 (1964), that the Court held that the Fifth Amendment as such applied to the States, the Court in *Malloy* recognized and relied upon the fact that, even prior to this decision, there had been a "marked shift" to the Fifth Amendment federal standard in State "involuntary" confession cases. "The shift reflects recognition that the American system of criminal prosecution is accustorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay." *Malloy v. Hogan, supra,* at 7.

With the decision in *Malloy,* it is now absolutely clear that the Fifth Amendment right not to be compelled to incriminate oneself operates, through application by the Fourteenth Amendment, in the context of State police interrogation with the same force and effect as it does directly in the context of federal police interrogation.

D. Typical Police Custodial Interrogation Designed to Elicit a Confession Is Inherently Compelling.

It seems hardly necessary to argue at length that typical police custodial interrogation designed to elicit a confession is inherently compelling—inherently violative of

the subject's privilege against self-incrimination. The subject is arrested and held incommunicado by the police until they are finished interrogating him. He is completely within their control, surrounded by hostile forces, and cut off—except at the whim of the police—from any contact with the outside world that might give him support. Indeed, such a situation may well have been created for the explicit purpose of making the subject confess against his will.

This purpose and the effectiveness of incommunicado interrogation in achieving the purpose have been recognized by the leading writers on police interrogation techniques. INBAU & REID, CRIMINAL INTERROGATION AND CONFESSIONS, (1962) (hereinafter cited as INBAU & REID) states that "[t]he principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." (Emphasis in the original). O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1959) (hereinafter cited as O'HARA) emphasizes this point and explains the reasons:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions of criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law."

Both of these books as well as numerous other police manuals present varied and sophisticated methods to be used by police interrogators in extracting confessions through incommunicado custodial interrogation. The basic

theme of these works is well summed up in the following language of INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3rd ed. 1953):

> "[T]he interrogator's task is somewhat akin to that of a hunter stalking his game. Each must patiently maneuver himself or his quarry into a position from which the desired object [obtaining a confession] may be obtained . . ."

Their basic attitude is one of getting the subject [quarry] to confess despite himself—by trapping him into it, by deceiving him, or by more direct means of overbearing his will. Since it is impossible to set forth here at length the scope of these recommended police techniques, we shall only try here to highlight some of them. In addition, we have attached a chapter from O'HARA as an Appendix to this brief. We believe that this chapter is a fair sample of this book as well as of other interrogation manuals widely used and respected in police circles.[5]

A key element in police interrogation, as demonstrated by *Escobedo* and numerous other cases, is the manifestation by the police interrogator that he expects to obtain a confession from the suspect and that he is prepared to interrogate, under incommunicado circumstances, until he does. Thus *Escobedo* was not to see his attorney until the police were "done". 378 U. S. at 482. *Cf. Haynes v. Washington*, 373 U. S. 503 (1963). He was also consistently told throughout the interrogation that they had convincing evidence that he had fired the fatal shots. Both of these are recognized and recommended interrogation techniques. The first interrogation tactic recommended by INBAU & REID is: "Display an Air of Confidence in the Suspect's Guilt." p. 23.

5. This brief makes frequent use of police interrogation manuals as evidence of police interrogation practices since it is impossible to document actual practices by other means. It should be kept in mind, however, that the manual practices probably represent the most enlightened, and the least objectionable, standards of actual police work.

This "air of confidence" is to be used along with patience and persistence. p. 108. "Not only must the interrogator have patience, but he must also display it. It is well, therefore, to get the idea across, in most case situations that the interrogator has 'all the time in the world.' " p. 109.

O'HARA, after setting forth various "stratagems" to compel incriminating statements makes the following recommendation of "perseverance":

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without a relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. This method should be used only when the guilt of the subject appears highly probable." p. 12.

Can there be any doubt that under such circumstances many "subjects" of police interrogation will assume that the police have a right to an answer, and, indeed, to what the police regard as the "correct" answer—a confession of guilt? *Cf.* 8 WIGMORE, EVIDENCE 309 (3rd ed. 1940); DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 26-27 (1960): "It is probable that even today, when there is much less

ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, *or at least that it will be the worse for you if you do not.*" (Emphasis added.) The whole purpose of such interrogation is to produce in the subject "the fear that if he remained silent it would be considered an admission of guilt", *Bram v. United States,* 168 U. S. 532, 562 (1897), or indeed, that it might otherwise be "worse" for him.

INBAU & REID, pp. 111-112, recommends an "effective way to deal with a subject" who, despite all other pressures, has the knowledge of and the gall to insist upon his right not to be compelled to incriminate himself or asks to see a relative, friend or attorney:

> "IF A SUBJECT REFUSES TO DISCUSS THE MATTER UNDER INVESTIGATION, CONCEDE HIM THE RIGHT TO REMAIN SILENT, AND THEN PROCEED TO POINT OUT THE INCRIMINATING SIGNIFICANCE OF HIS REFUSAL.
>
> "The most effective way to deal with a subject who refuses to discuss the matter under investigation is to concede to him the right to remain silent. This usually has a very undermining effect. First of all, his is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.
>
> "After this psychological conditioning, the interrogator should then proceed to point out to the subject the incriminating significance of his refusal to talk. The following comments have been found to be very effective: 'Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this.

Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, "I don't want to answer any of your questions." You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you and so will everybody else. So let's sit here and talk this whole thing over.'

"After the subject has been talked to in this manner, the interrogator should then immediately ask the subject some innocuous questions that have no bearing whatsoever on the matter under investigation. For instance, the interrogator may inquire of the subject, 'How long have you lived in this city?'; 'Where are you working?'; 'How long have you worked there?'. As a rule the subject will answer such questions, and then gradually the examiner may start in with questions pertaining to the offense under investigation. Except for the career criminal, there are very few persons who will persist in their initial refusal to talk after the interrogator has handled the situation in this suggested manner.

"If a subject expresses a desire to talk to a relative, or to an employer, or to any other person, the interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' "

Is there any doubt that a statement produced under such circumstances results from undermining the "subject's" right "to remain silent unless he chooses to speak

in the unfettered exercise of his own will"! *Malloy v. Hogan, supra,* at 8.

Can it be seriously asserted that the extracting of confessions under such circumstances conforms to our accusatorial system under which "society carries the burden of proving its charge against the accused not out of his own mouth . . . [and] must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation." *Watts v. Indiana,* 338 U. S. 49, 54 (1949) (opinion of Frankfurter, J.). Where there has been a confession elicited through misapprehension, fear, trick or stratagem has there not been a violation of the basis of our system that "[t]he law will not suffer a prisoner to be made the deluded instrument of his own conviction." 2 Hawkins, Pleas of the Crown, c. 64 § 34 (8th ed. 1924). Indeed, such police interrogation has been aptly characterized as the worst of both worlds: "It is the inquisitorial system without its safeguards." *Watts v. Indiana, supra,* at 55 (opinion of Frankfurter, J.).

The absurdity of calling a confession "voluntary" when produced by typical police custodial interrogation designed to elicit a confession has been pointed up by an apt example in Professor Sutherland's recent article, Crime and Confession, 79 HARV. L. REV. 21, 37 (1965):

> "Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses', keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have

the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

E. *Escobedo* Was Not Revolutionary, But Rather the Natural Culmination of a Series of Cases.

It was within this context of police custodial interrogation aimed at eliciting a confession that the Court in *Escobedo* held that denying Escobedo the presence of counsel during the interrogation resulted in the confession being obtained in violation of his right not to be compelled to incriminate himself. Despite the furor raised in some corners about the revolutionary nature of this decision, it is submitted that the decision was not revolutionary, but rather the natural culmination of a series of cases.

As noted above, beginning with *Lisenba v. California,* 314 U. S. 219 (1941), there was started a shift to the testing of State confessions by Fifth Amendment standards. This development culminated, in one of its phases, in the holding of *Malloy* that the Fifth Amendment right not to be compelled to incriminate oneself was applicable in toto to the States through the Fourteenth Amendment.

Alongside this development was the recognition by the Court in numerous "involuntary" confession cases that the fact that a suspect was held incommunicado, and, in particular, that he was not given access to an attorney during the interrogation period was highly significant in the determination of whether or not a confession was "voluntary." See, e.g., *Chambers v. Florida,* 309 U. S. 227 (1940); *Ashcraft v. Tennessee,* 322 U. S. 143 (1944); *Haley v. Ohio,* 332 U. S. 596 (1948); *Fikes v. Alabama,* 352 U. S. 191 (1957); *Spano v. New York,* 360 U. S. 315 (1959); *Culombe v. Connecticut,* 367 U. S. 568 (1961); *Gallegos v. Colorado,* 370 U. S. 49 (1962); *Haynes v. Washington,* 373 U. S. 503 (1963).

In this last case—which has been described by the Court as one in which there was "held inadmissible even a confession secured by so mild a whip as the refusal, under

certain circumstances, to allow a suspect to call his wife until he confessed," *Malloy v. Hogan, supra,* at 7 (1964)—the Court relied heavily upon the facts that Haynes was held incommunicado, at no time was warned of his right to remain silent or that his answers might be used against him nor told of his rights respecting consultation with an attorney. The step from *Haynes* to *Escobedo* is an extremely short one, if, indeed, one at all. If *Haynes* represents the capstone of the "involuntary" confession cases, then *Escobedo* represents the application of this capstone in light of the full Fifth Amendment protection held to be applicable to State interrogation by *Malloy.*

F. The Inherently Compelling Nature of Police Custodial Interrogation Requires That a Confession Obtained During Such Interrogation Be Excluded Unless the State Shows That There Were Present Adequate Devices to Protect the Subject's Privilege Against Self-Incrimination.

As the above analysis shows, usual police custodial interrogation designed to elicit a confession is inherently violative of the subject's right not to be compelled to incriminate himself. It is obviously impossible to probe the mind of the subject of this interrogation to determine whether in fact these compelling circumstances were the causative force behind his making the self-incriminating statements. Recognizing this fact, this Court has never adopted such a self-defeating inquiry but has tested the issue of compulsion as against the possibility of compulsion inherent in the external situation. *Cf. Ashcraft v. Tennessee,* 322 U. S. 143, 154 (1944). When the external police created situation is such to be inherently prejudicial to the subject's privilege against self-incrimination, a Court does not, and can not "stop to determine whether prejudice resulted." *Hamilton v. Alabama,* 368 U. S. 52, 55 (1961).[6]

6. On this point, the same result should be reached on a Sixth Amendment approach as there the issue is also one of possible, not actual prejudice. See *Hamilton v. Alabama,* 368 U. S. 52 (1961).

It is particularly apt that the focus of a self-incrimination issue be on the external conditions established by government. As this Court has recognized, a major basis for the privilege was our rejection of the inquisitorial *system*, the Star-Chamber *process*. See, e.g. *Murphy v. Waterfront Commission*, 378 U. S. 52, 55 (1964). Thus, concentration on the *system* or *process* of police interrogation is not only appropriate but necessary if we are to maintain fidelity to one of the major purposes of the privilege.

It is within this concept of analyzing the police process that we have reviewed the process of police custodial interrogation designed to elicit a confession and shown that this process is typically violative of the subject's privilege against self-incrimination.

G. Under the Present Circumstances of Police Custodial Interrogation Designed to Elicit a Confession, the Presence of Counsel Is Required to Protect the Subject's Privilege Against Self-Incrimination.

The issue now is what protective devices need be added to this police custodial interrogation to make the process conform to Fifth Amendment requirements, i.e., to dispel the government established compelling atmosphere. *Escobedo*, consistent with previous precedent, held that, under the present conditions of police custodial interrogation, the presence of counsel was this necessary protective device. The protection of the Fifth Amendment privilege afforded by the presence of counsel in police custodial interrogation designed to elicit a confession has been spelled out in the other briefs in this case, is well known to this Court, and therefore, can be here quickly summarized. These include giving an effective warning of the suspect's privilege "to remain silent unless he chooses to speak in the unfettered exercise of his will"; providing someone in whom the subject can confide and who is a contact between the subject and the outside world; assuring that if the subject chooses

to tell his story, he does so in a way that conveys his intended meaning; and providing an outside observer to the interrogation proceedings.

Obviously an effective warning of the privilege is a keystone of its effective enforcement. It is equally clear that there is a need to provide the presence of someone at interrogation in whom the subject can confide and who will bolster his confidence. As discussed above, it is a prime function of police custodial incommunicado interrogation to tear a subject away from all things in which he can rely for support and place him in complete subservience to the interrogator. The aim is to have him dominated by the interrogator. In order to dispel such circumstances, therefore, it is manifestly necessary that the incommunicado environment be eliminated. The presence of counsel will tend to accomplish this aim. Not only is counsel a person outside the police force, he is one who can meet the accomplished police interrogator on a level of at least partial equality. By training and experience he should not be afraid to stand up to unrestrained governmental power. He is someone in whom the subject can freely confide. It is his job to be a whole-hearted advocate for the subject with no conflicting interests in this regard.

In order to make effective the privilege against self-incrimination it is also necessary to ensure that if a person desires to tell his story he is allowed to do so in a way that conveys his intended meaning. A police interrogator, however, is basically an accomplished cross-examiner who is trained to allude to a particular piece of incriminating evidence but then to "be on guard to shut off immediately any explanation the subject may start to offer at that time." Inbau & Reid, p. 27. Counsel present will tend to ensure that the accused has a real opportunity, if he so desires, to tell his story effectively and to eliminate distortions and ambiguities. In short, counsel can aid in examining the accused so that his story comes out as he aims to tell it as well as protecting him from unrestrained cross-examination. This Court has recognized the need

for "the guiding hand of" counsel to so aid an accused at trial where "[t]he tensions . . . for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely." *Ferguson v. Georgia,* 365 U. S. 570, 594 (1961). The Court in *Ferguson* recognized that "when the average defendant is placed in the witness chair and told . . . that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense, he has been set adrift in an uncharted sea with nothing to guide him . . . ." *Id.* at 593. The accused may be "overwhelmed by his situation, and embarrassed . . . and . . . it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances." *Id.* at 595-596. These statements were made in the context of a trial in which the accused had spoken with counsel before taking the stand, and his counsel and friends were present throughout. Moreover, the prosecutor could not cross-examine. Can there be any doubt that they are even more relevant where the accused is held incommunicado and at the same time subjected to intense, unrestrained cross-examination? *Cf. Pointer v. Texas,* 380 U. S. 400 (1965).

Finally, if counsel is present at the interrogation, he can ensure that there will be a record of the entire proceedings, so as to preserve the context in which any statement is made. He can make certain that there is no "off the record" pressure exerted on his client. Too often a court determination of the admissibility of a confession turns on whether the court believes the police or the accused in their often conflicting stories of what has occurred in that sound-proofed, windowless interrogation room. The presence of counsel will provide a witness to the interrogation process and counsel will, by his presence, deter any possibility that the police might, in their zeal to extract a confession, resort to practices intended to compel one.

This summary of the need for the presence of counsel during custodial police interrogation designed to elicit a

confession leads to a clear resolution of a number of "*Escobedo* questions" now being presented to the Court.

1. *A Police Warning of the Right to Remain Silent Is Not Adequate to Protect the Subject's Privilege Against Self-Incrimination.*

It is clear that a police warning cannot even be argued to serve any of the above-stated necessary protective functions other than the giving of the warning itself. It is submitted, however, that it does not adequately serve even this limited function.

As has been stated:

> "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be. Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer." *Von Moltke v. Gillies*, 332 U. S. 708, 725-26 (1948) (opinion of Black, J.).

Professor Kamisar has recently written:

> "(W)hen we expect the police dutifully to note a suspect of the very means he may utilize to frustrate them—when we rely on them to advise a suspect unbegrudingly and unequivocally of the very rights he is being counted on *not* to assert—we demand too much of even our best officers. As Dean Edward L. Barrett has asked '*(I)s it the duty of the police to persuade the subject to talk or persuade him not to talk? They cannot be expected to do both.*'" Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time, Magna Carta Essays (Howard, ed. 1965). (Emphasis added.)

It seems hard to state a more effective answer to a claim that a police warning is adequate than that given in the Amicus Brief of the National District Attorneys'

Association: At best the police warning "will benefit only the recidivist and the professional. *The first offender and the Culombes, Fikeses, Malloys, Haynes or Recks will not be the beneficiaries.*" P. 14. (Emphasis added.)

Moreover, this same brief makes the point that in imposing a duty resting solely on the police, with no objective verification of its exercise, there is a likelihood that the police will "stretch the truth" as to the fulfillment of this duty. The brief quotes the following passage from DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND, 47 (1960) concerning experience in England with the Judges' Rules:

> "The Rules undoubtedly required the observance of a very high standard, and it may be a higher standard than the average policeman was in the first instant naturally inclined to adopt. It is difficult to say what extent the spirit of the Rules is infringed because, as I have said, *it is the general habit of the police never to admit to the slightest departure from correctness.*" (Emphasis added by the N. D. A. A. Brief to the original.)

Indeed, in light of such contemplated police action and the sophisticated interrogation techniques used by the police, it is not impossible to conceive the use of a formal warning as a direct means of intimidation and compelling the subject to confess.

Even if, however, a perfunctory warning of the right to remain silent given by the police prior to interrogation might be an effective protective device for a time thereafter, its effectiveness would soon wear off when confronted by the plethora of police stratagems and techniques designed precisely to loosen the subject's tongue.

The Court in *Ecobedo* quite clearly recognized this fact when it found that even a prior warning of the right to remain silent given to Escobedo by his attorney was not effective in dispelling the compelling circumstances presented by new police stratagems. Despite these prior

warnings, Escobedo was compelled to incriminate himself when presented with the classic interrogation technique of an accomplice's accusation—a technique clearly designed to overcome the subject's desire not to speak. How much more easily could the effect of a police warning be overcome by such techniques.

2. *Prior Access to Counsel, as Distinguished From the Presence of Counsel, Is Not Adequate to Protect the Subject's Privilege Against Self-Incrimination.*

The above-stated facts of *Escobedo* indicate also that prior access to counsel rather than the presence of counsel at interrogation is not sufficient to protect the subject's Fifth Amendment right not to be compelled to incriminate himself; the effectuation of that right necessitated that Escobedo have counsel present when he was confronted with the new police stratagem of the accomplice's accusation. As the Court stated: "The 'guiding hand of counsel' was essential to advise petitioner of his rights in this delicate situation." 378 U. S., at 486. In addition, of course, again prior access to counsel does not even arguably provide the other necessary protective devices.

3. *Neither the Existence of Retained Counsel nor a Request to See Him Are Required by the Proper Application of Escobedo.*

It is true that in *Escobedo,* the subject of custodial police interrogation had retained counsel and requested to see him. The relevance of these facts, however, depends upon the proper analysis of the rights protected by that decision; the analysis contained in this brief clearly shows that they are not at all significant. The issue always remains a determination of what is necessary to dispel the compelling atmosphere of the interrogation. It is true that when Escobedo asked for and was denied the right

to consult his attorney this clearly reinforced the compelling nature of the interrogation. The refusal told him in no uncertain terms that the police were in charge, that they were determined to get him to confess and that they would not let him see his attorney until they chose to do so—after he confessed. *Cf. Haynes v. Washington,* 373 U. S. 503 (1963).

Yet, as the above discussion has shown, even absent this aggravating element of *Escobedo,* such interrogation was inherently compelling and only the presence of counsel could dispel that atmosphere. Indeed, it might be argued that Escobedo's expressed request to consult with counsel indicated that the usual compelling nature of the interrogation would not work as effectively on him as on others. Escobedo obviously had a sense that he had some rights and was not completely subject to the will of the interrogator. A requirement that there must be a request would only result in placing the ignorant and inexperienced —those who most need the services of an attorney to dispel the compelling nature of the interrogation—at a distinct disadvantage in the enforcement of their constitutional rights. "The defendant who does not ask for counsel is the very defendant who most needs counsel; we cannot penalize a defendant, who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it." *People v. Dorado,* 42 Cal. Rep. 169, 177-178, 398 P. 2d 361, 369-371, *cert. denied* 381 U. S. 946 (1965).

The same analysis leads clearly to the result that it is irrelevant that a subject of police custodial interrogation cannot afford retained counsel. It cannot seriously be maintained that an indigent subject's Fifth Amendment rights are less deserving than those of an affluent one. Since the presence of counsel is as necessary to effectuate

an indigent subject's Fifth Amendment right as those of a more affluent interrogation subject, counsel must be equally available to both.

As Professor Kamisar, *supra,* at 71-73 has written:

> "If, as the *Escobedo* Court tells us, our Constitution strikes the balance between the importance of an 'interrogation opportunity' to the police and the criticalness of that stage to the accused 'in favor of his privilege against self-incrimination' how can those . . . [too poor to retain counsel] be denied the benefits of this policy resolution? If 'the guiding hand of counsel' at the police interrogation stage is 'essential to advise [a suspect] of his rights in this delicate situation,' how does the situation become less delicate, less perilous; why does the need for legal guidance diminish, when the suspect is poor or ignorant?
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> • • •
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> "To say that the aforementioned alleged classifying traits do not bear a reasonable relation to the policies and purposes of *Escobedo* is not the worst that can be said for them. It may also be said that, at least insofar as the criminal process is concerned, most, if not all, of these traits cannot be the basis for constitutional classification; they are irrelevant per se. If 'the mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color' —then the inability of a suspect to retain counsel cannot constitute sufficient grounds for limiting the impact of *Escobedo* . . ."

In the words of the *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice,* p. 9 (1963):

> "It should be understood that governmental obligation to deal effectively with problems of poverty in the

> administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity. It does not presuppose a general commitment on the part of the federal government to relieve impoverished persons of the consequences of limited means, whenever or however manifested. It does not even presuppose that government is always required to take into account the means of the citizen when dealing directly with its citizens . . .
>
> "The obligation of government in the criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this Report is concerned arise in a process initiated by government for the achievement of basic government purposes. It is, moreover, a process that has as one of its consequences the imposition of severe disabilities on the persons proceeded against. Duties arise from action. When a course of conduct, however legitimate, entails the possibility of serious injury to persons, a duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevent to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

The decisions of this Court support the statements of Professor Kamisar and the Attorney General's Committee. See *Gideon v. Wainwright*, 372 U. S. 335 (1963); *Douglas*

v. California, 372 U. S. 353 (1963); *Lane v. Brown*, 372 U. S. 477 (1963); *Draper v. Washington*, 372 U. S. 487 (1963); *Griffin v. Illinois*, 351 U. S. 12 (1956). Indeed, *Douglas v. California, supra*, seems directly on point for the issue here presented. In that case, the Court held that where an appeal is provided to all those convicted of crime, an indigent is entitled to an attorney on such appeal since the assistance of an attorney is required to effectuate this right to appeal. As we have thus analyzed *Escobedo* the parallel is obvious. There the Fifth Amendment privilege against self-incrimination is constitutionally provided to all persons. Failure to provide the assistance of counsel during police custodial interrogation designed to elicit a confession renders this right illusory in such context. Can there then be any question, under *Douglas*, that the merger of the Fifth Amendment and Equal Protection Clauses requires the appointment of counsel for an indigent?

II.

Application of the Rule in Contexts Other Than the Usual Police Custodial Interrogations Designed to Elicit a Confession.

This discussion of the meaning and application of *Escobedo* has been concerned solely with custodial police interrogation designed to elicit a confession. This is the context in which all the cases now presented to the Court arise and on the basis above set forth it is urged that the Court hold that the confessions were inadmissible in these cases.

We will not attempt to apply the analysis in this brief to all possible hypothetical cases of police interrogation not consisting of in-custody interrogation designed to elicit a confession. It is submitted that these other situations must be decided as they arise with full consideration given to the factual variants presented. *Cf. Haynes v. Washington*, 373 U. S. 503 (1963).

Where, for example, questioning is of a general investigatory type, where it is conducted in the questionee's home with family and friends present, or where there are other possible factual patterns, it may not be necessary to have counsel present in order to protect the questionee's right not to be compelled to incriminate himself. Again, the situation is far different from that analyzed in this brief, where a person volunteers a statement without any prior police questioning or pressure. While, therefore, there is no litmus paper test to solve all questions in this area, it is submitted that the basic principle remains constant. That principle is measuring the government-founded circumstances surrounding the confession against the Constitutional requirement that these circumstances not be such as to be conducive to a violation of the questionee's right not to be compelled to incriminate himself—his right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan,* 378 U. S. 1, 8 (1964).

It must also be remembered that neither in *Escobedo* nor in any of the cases now presented to this Court has there been any evidence that what was conducted was not usual police interrogation designed to elicit a confession. In none of these cases has there been any evidence that there were operative, either by legislative determination or police practice, protective devices other than the presence of counsel that might even arguably be effective in dispelling the inherently compelling nature of this type of interrogation.

Although your Amicus feels that the chances are unlikely it is, of course, possible that protective devices other than the presence of counsel may be devised and become operative which are effective to protect the Fifth Amendment right in police custodial interrogation and thereby remove the need for the presence of counsel for this purpose. If such new devices are proposed and become operative, of course, it would be the duty of the courts to deter-

mine whether or not they meet the need. A holding that under the available devices of today, the presence of counsel is necessary to protect the Fifth Amendment right should not foreclose a determination that other available protective devices are equally acceptable when and if such devices are formulated.

As stated above, however, neither in *Escobedo,* nor in any of the cases now before this Court, have any of the government parties argued the availability or advisability of other protective devices. Indeed, the government arguments in the present cases are that not even the clearly inadequate devices of a police warning or prior access to counsel should be provided in an attempt to dispel the compelling nature of police custodial interrogation designed to elicit a confession. What is desired is the unrestrained existence of this compelling situation.

III.

The Argument That Police "Need" the Existence of the Compelling Nature of Custodial Interrogation Must and Should Be Rejected.

It is argued to this Court that restrictions on the powers of the police freely to interrogate suspects as here advocated will prevent effective police work and thus contribute to what is asserted to be a mounting crime rate and that, therefore, the balance in this area must and should be struck, not on the side of the protection of individual liberties, but on the side of this asserted police need.

A. Even if Such "Need" Were Shown the Constitution Requires That the Balance Be Struck on the Side of Effective Enforcement of the Fifth Amendment.

It is submitted that even if these claims of police need were substantiated, the Constitution requires that the bal-

ance here be struck on the side of effectively enforcing an accused's Fifth Amendment right not to be compelled to incriminate himself.

As the Court stated in *Escobedo,* 378 U. S., at 488-490:

> "Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . .
>
> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . . .
>
> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." (Emphasis in the original.)

B. However, It Is Not Necessary for This Court to Face the Ultimate Balancing as the Asserted Police "Need" Has Not Been Shown to Exist.

This ultimate balancing issue, however, need not be reached as the case for the asserted police "need" has not been made out. For an analysis of the available data, see Kamisar, On the Tactics of Police-Prosecution Oriented Critics on the Courts, 49 Cornell L. Q. 436 (1964).

The first point in the police-necessity thesis is the postulate that there is a clear link between court decisions protecting the rights of the accused and an alleged upward advance in the rate of criminal behavior. Even if it is assumed that there has been a rise in criminal behavior in the last few years, an issue not at all free from doubt, see Kamisar, *supra,* 49 Cornell L. Q., at 462, it is clear that there has been no showing of a link between such a rise and court decisions securing individual liberties.

Certainly no statistical data has been produced to show such a link. See Kamisar, *supra,* 49 Cornell L. Q., at 458-471. While admitting this lack of statistical data, Professor Inbau, a leading spokesman for police necessity, has argued that "simple logic" supports the existence of such a link. Inbau, *More About Public Safety v. Individual Civil Liberties,* J. CRIM. L. C. & P. S., 329, 331 (1962). Professor Inbau has recently stated that "since most crimes are solveable only by this interrogation opportunity, whenever you get the courts restricting that interrogation opportunity, you are going to solve fewer crimes and you are going to catch fewer criminals. Furthermore, the incentive to commit crime as well as the actual amount of crime is going to increase." *A Forum on the Interrogation of the Accused,* 49 Cornell L. Q. 382, 387-388 (1964).

Assuming *arguendo,* that interrogation opportunity is necessary to solve crimes and convict criminals, is it clearly a matter of "simple logic" that there is a causal connection between restricting this opportunity and an increased incidence of criminal behavior? It hardly needs to be stated that the roots of crime are planted in a number of complex social factors such as: discrimination, environment, drug addiction and unemployment, as well as individual psychological and psychiatric variants. We are only now beginning to gain the necessary knowledge in order to cope with and treat causes rather than symptoms. It is

just too simplistic a form of logic to ascribe criminal behavior to court decisions.

Indeed, it may well be argued that "simple logic" indicates that there is a causal link between unrestrained police conduct and a high incidence of criminal behavior.

As Mr. Justice Brandeis has so eloquently written:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means —to declare that the Government may commit crimes in order to secure the conviction of a private criminal— would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead v. United States,* 277 U. S. 438, 485 (1928) (dissenting opinion), quoted with approval by the Court in *Elkins v. United States,* 364 U. S. 206, 223 (1960) and *Mapp v. Ohio,* 367 U. S. 643, 649 (1961).

Recently, Judge Bazelon has amplified this thought:

> "We should be aware that if the protections of the Bill of Rights are restricted we shall, in practice, be affecting directly the rights of only our more deprived population. When we talk about arrests for investigation, lengthy police interrogation prior to arraignment, and the like, the subject under discussion is not you or I. We don't get arrested without probable cause because, to put it plainly, we don't 'look' as if we would commit acts of violence and we do look as if it might not pay to trifle with our rights. Nor would you or I be subjected to long interrogation by the

police without the benefit of counsel. Nor do you and I live in neighborhoods where the police dragnet is used, and where suspects are subjected to wholesale arrest. "So the issue really comes down to whether we should further whittle away the protections of the very people who most need them—the people who are too ignorant, too poor, too ill-educated to defend themselves. Can we expect to induce a spirit of respect for the law in the people who constitute our crime problem by treating them as beyond the pale of the Constitution?" Bazelon, *Law, Morality & Civil Liberties,* 12 UCLA L. REV. 13, 27-28 (1964).

This is not to say that any "simple logic" shows that there is a causal link between lack of restraints on the police and an increased incidence of criminal behavior. It is to say that the converse "simple logic" is not self-evident and that in this area of complicated sociological and psychological factors there are no "simple logic" answers.

In particularizing the police necessity argument in the area of unrestrained police interrogation, its proponents argue that restraints on police interrogation such as here advocated will result in the elimination of the obtaining of confessions, see *Escobedo,* 378 U. S., at 488, and that the resulting unavailability of confessions will drastically reduce the possibility of obtaining convictions of the guilty. See e.g., N. Y. TIMES, Dec. 2, 1965, p. 1, col. 2; *id.*, May 14, 1965, p. 39, col. 1.

It does not seem, however, that either "simple logic" or available statistical data supports these assertions. Even if it is assumed that the current practice of most prosecutors is not to interrogate suspects when counsel is present, see Note, 73 YALE L. J. 1000, 1049, 268:

> "[T]he fact that most prosecutors do not now interrogate a man once he has obtained counsel does not mean that they would find interrogation with counsel

useless. Nor does the present practice of criminal lawyers of advising his client to keep silent during interrogation mean that he would invariably advise silence if he were permitted to be present and to have some control over the process. The attorney has not, contrary to generally accepted notions, seen his role as constant impediment to the criminal process, making it as hard for the state as possible. In many cases full disclosure is exchanged for a lesser charge. In fact, more guilty pleas are obtained from counseled defendants than from non-counseled ones. Furthermore, an attorney may find the flow of information helpful. Counsel now does not invariably advise his client not to take the stand at trial. Similarly, at interrogation, participating counsel may find out what the District Attorney really knows about the case." *Id.*, at 1049.

Indeed, not all prosecutors urge that they or the police need the power of secret interrogation; witness the remarks of District Attorney Aaron E. Koota, N. Y. TIMES, Nov. 22, 1964, p. 35, col. 1, under whose jurisdiction the ill-fated and much publicized "confession" of George Whitmore, Jr. was elicited. See also Sutherland, *Crime and Confession,* 79 HARV. L. REV. 21, 37-39 (1965).

More significantly, there is no substantiation for the claim that confessions are necessary to the conviction of the guilty. Attempts to obtain confessions may be used as "easier" substitutes for proper, independent police investigatorial processes. Moreover, confessions are sometimes sought even when ample other evidence is already in hand. Police have attempted to elicit confessions when the crime has been committed in front of a dozen witnesses, indeed when it has been committed in the presence of the police themselves. For example, there could scarcely have been less need for a confession than was present in the circumstances of *People v. Dorado,* 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), *cert. denied,* 381 U. S. 946 (1965). See

also Sobel, The Exclusionary Rules in the Law of Confessions, A Legal Perspective—A Practical Perspective, Part Six, N. Y. Law J., Nov. 22, 1965, p. 1, col. 4.

As the Court stated in *Haynes v. Washington*, 373 U. S. 503, 519 (1963):

> "This case illustrates a particular facet of police utilization of improper methods. While history amply shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public. The claim, so often made in the context of coerced confession cases, that the devices employed by the authorities were requisite to solution of the crime and succession prosecution of the guilty party cannot here be made."

It should also be noted that India and Scotland have strict rules excluding from evidence confessions obtained as a result of police interrogation and such rules do not seem to have marked effects on law enforcement in those countries. See, Note, 73 Yale L. J. 1000, 1045-1046 (1964). Nor has any substantial adverse effect of law enforcement been shown in the federal and state jurisdictions that operate under the *McNabb-Mallory* rule or an equivalent. *Id.*, at 1046.

While these facts by no means prove that the eliciting of confessions is not essential to the solution of crime and the conviction of the guilty, they do cast substantial doubt

on the unsupported assertions of police and prosecutors of the essentiality of confessions.

In summation on this point, it seems quite evident that while not clearly refuting the claim, neither simple logic nor the available statistical evidence supports the argument that opportunities for secret, unrestrained and unhampered police and prosecutorial interrogation are essential to controlling or reducing the incidence of criminal behavior.

If there is more data in this area that should or can be produced, the burden of production clearly rests on government and not on an individual accused. An individual accused has neither the motivation nor resources to produce data relevant to a determination of the "need" for allowing the unrestrained police interrogation desired by those who assert the existence of such a need. On the other hand, government has both the continuing interest and the resources to produce such data if, in fact, it can be done. Thus far, nothing has been produced that could by any stretch be deemed to justify overriding a suspect's constitutional rights because of overwhelming societal necessity.

Not only has government not produced any such data in litigation contexts, there have not even been governmental legislative determinations of such need. It is significant that in none of the "involuntary" confession cases, nor in *Massiah, Escobedo* nor the cases here presented has the police interrogation been pursuant to a legislative determination that such interrogation is necessary or proper. Indeed, to the extent that there have been legislative determinations, they have been that such interrogation is neither necessary nor proper. Rule 5(a) of the Federal Rules of Criminal Procedure requires federal officers to take arrested persons before a commissioner "without unnecessary delay." Thirty-six states have similar procedures using either such general times as "without necessary delay" or specific time limits. For a collection of the statutes, see, *LaFave, Detention for Investigation by the*

Police: An Analysis of Current Practices, 1623 WASH. U. L. Q. 331, 332-333. And, in some states, a suspect has a statutory "right" not to be held incommunicado. For a collection of the statutes see *Crooker v. California,* 357 U. S. 433, 448 n. 4 (1958) (dissenting opinion). See also *Lisenba v. California,* 314 U. S. 219 (1941); *Ashcraft v. Utah,* 357 U. S. 427 (1947); *Escobedo v. Illinois,* 378 U. S. 478 (1964).

It seems clear that in a scale composed of the unsupported necessity assertions of police and prosecutors on one side and the effectuation and protection of a person's constitutional right not to be compelled to incriminate himself on the other, the balance must be struck on the side of the Constitutional right.

Respectfully submitted,

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Appendix.

O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION (1959)

Chapter 9

Interrogations

1. Terms

For the purpose of simplifying the treatment of interrogations a special meaning will be attached to some of the terms used. It should be understood that these conventions are not universally accepted.

a. *Interrogations.* An interrogation is a questioning of a person suspected of having committed an offense or of a person who is reluctant to make a full disclosure of information in his possession which is pertinent to the investigation.

b. *Witness.* A witness is a person, other than a suspect, who is requested to give information concerning an incident or person. He may be a victim, a complainant, an accuser, a source of information, an observer of an occurrence, a scientific specialist who has examined physical evidence or a custodian of official documents. A witness is usually interviewed, but he may be interrogated when he is suspected of lying or of withholding pertinent information.

c. *Suspect.* A suspect in an offense is a person whose guilt is considered on reasonable grounds to be a practical possibility.

d. *Subject.* The term subject will be used here most commonly to represent the person, whether witness or sus-

pect, who is being interviewed or interrogated. The subject in this sense is not necessarily the subject of the case under investigation. Where the term is used to refer to the subject of the case, the distinction will be apparent from the phrasing and context. A subject is ordinarily interrogated for one of the following purposes:

1) To obtain a confession to the crime.

2) To induce the subject to make admissions.

3) To learn the facts and circumstances surrounding a crime.

4) To learn the identity of accomplices.

5) To develop information which will lead to the recovery of the fruits of the crime.

6) To discover the details of any other crimes in which the suspect participated.

2. The Interrogator

The interrogator must be able to dominate his subject, not through use of his formal authority but because his personality commands respect. He must be professional in attitude and performance. If he reveals any wavering tendencies the suspect may discover the means of resisting the interrogation. To inspire full confidence, the force of the investigator's personality should be tempered by an understanding and sympathetic attitude. The subject must feel instinctively that he is talking man-to-man with a person who is interested in his viewpoint and problems. The suspect who has been forced to cooperate with hostile organizations will tell his story much more readily if he feels that the investigator understands his helplessness and is inclined to take his plight into consideration. The following qualifications and traits are desirable in an interrogator:

a. *General Knowledge and Interests.* To a large degree, the efficiency of an investigator is commensurate with

his general knowledge. To acquire this breadth of knowledge, the investigator must develop intellectual curiosity and a keen sense of observation. He must cultivate a genuine interest in people and their problems, for such knowledge will help him in determining motives as he deals with many types of personalities in a variety of circumstances. It is highly desirable that he have a wide range of knowledge concerning professional and technical matters, since his subjects represent nearly every phase of human activity. The background and personality of these individuals, together with the information they provide, can be assessed adequately only if the interrogator is prepared to discuss their major interests intelligently and to analyze their motives in light of environmental factors.

b. *Alertness.* The variety of problems confronting him requires the interrogator to be constantly alert so he can analyze his subject accurately, adapt his technique to the requirements of the case, uncover and exploit leads, and alter his tactics when necessary. A sense of logic will not in itself quickly reveal contradictions in a subject's story; it must be accompanied by a quick awareness of the contradictory information. Discovery of gaps in the subject's story after the interrogation is less satisfactory than on-the-spot recognition, because the time interval gives the subject opportunity to reflect upon the matter before questioning is renewed.

c. *Perseverance.* Every interrogation requires a great deal of patience if complete and accurate information is to be obtained. The need for patience is obvious when lack of cooperation is encountered; but perseverance frequently is required even when the suspect is willing to help but is unable to recall precisely the complex ramifications of his story or to explain discrepancies.

d. *Integrity.* If the individual being questioned has reason to doubt the integrity of the interrogator, it is practically impossible for the latter to inspire confidence or

trust. The interrogator must never make a promise he cannot keep; he should keep all promises he makes.

e. *Logical Mind.* The interrogator must develop the questioning along a logical line. The objectives of the questioning should be clearly defined in his own mind. A plan of questioning should be built around the requirements of establishing the elements of proof of the offense.

f. *Ability in Observation and Interpretations.* He must not only develop the ability to "size up" an individual, but also must learn to observe and interpret his reaction to questions.

g. *Power of Self-Control.* He must maintain control of himself at all times. Loss of temper results in a neglect of important details.

h. *Playing the Part.* It is quite justifiable during questioning, if it will accomplish the desired results, for the investigator to act as though he were angry or sympathetic to suit the needs of the situation.

2. Conduct of the Interrogator

The behavior of the interrogator at the outset of the questioning usually establishes the atmosphere that will prevail throughout the interrogation. It is of great importance for the investigator to develop an effective personality that will induce desire to respond in the subject. Personal mannerisms must be controlled wherever they distract or antagonize. The following are some of the more useful reminders concerning attitude and demeanor:

a. *Dominate the Interview.* The interrogator must always be in command of the situation. The strength of his personality must constantly be felt by the subject. He must never lose control through indignation, ill temper, hesitancy in the face of violent reactions, or obvious fumbling for questions as a result of a lack of resourcefulness.

b. *Distracting Mannerisms.* The subject must be impressed with the seriousness of the interrogator's purpose. Pacing the room, smoking, "doodling," and similar forms of behavior should be avoided, since they tend to convey a sense of inattentiveness or a lack of concentration. The investigator should seat himself close to the subject with no intervening furniture and focus his attention on the subject. The full weight of his personality must be brought to bear on the emotional situation. Distance or obstructions provide the subject with a small degree of confidence and relief.

c. *Language.* The speech of the interrogator should be adapted to the subject's cultural level. Profanity and vulgarity should be avoided, since they diminish the effectiveness of the interrogator by compromising his dignity or antagonizing the subject. The uneducated subject must be approached in his own language. Simple, forthright diction should be employed. It is especially important in sex cases to avoid ambiguities. Slang may be used if it provides ease of speech or fluency to the subject. The choice of words should be made with a view to encourage a free flow of speech in the subject. Where the subject may shy away from words such "assault" and "steal," he may not hesitate to admit that he "hit" or "took." It is a natural tendency for a person to describe his conduct in terms of euphemisms.

d. *Dress.* Civilian dress is more likely to inspire confidence and friendship in a criminal than a uniform. The accoutrements of the police profession should be removed from view. The sight of a protruding gun or billy may arouse an enmity or defensive attitude on the part of the criminal.

e. *Attitude.* The interrogator is not seeking to convict or punish. He is endeavoring to establish the facts of the case; to discover the truth; to clarify a misunderstanding; to help the criminal to straighten himself out; to clear up

this mess; to simplify matters; to rectify an unfortunate situation; to see what he can do to help the subject to help himself; to get rid of a distasteful task as painlessly as possible; to see that the subject's accomplices are not doing him an injury; and so forth. There is an endless series of locutions with which the investigator can attractively decorate his role in the administration of justice.

f. *Preliminary Conduct.* In military and certain other federal investigative agencies, it is required that the interrogator identify himself and show his credentials to the subject. He must then state, in general terms, the purpose of the interrogation. Before beginning the questioning, the must advise the suspect of his rights against self-incrimination and inform him that he does not need to answer the questions and that if he does answer, his answers can be used as evidence against him.

g. *Presence of Other Persons.* It is desirable to restrict the number of persons present at an interrogation. If a confession is obtained the defense may claim the existence of duress because of the presence of five or ten police officers. Moreover, some courts require the prosecution to produce all the witnesses of a confession. A parade of ten detectives to the witness stand creates an unfavorable impression and opens up the likelihood of inconsistencies of the testimony. Ordinarily the interrogator should be alone with the subject. Other parties may be brought in for a specific purpose, such as witnessing the signing of a confession.

3. Place

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions

or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. The structure, the personnel, and all observable activities have but one purpose—the discovery of truth and the detection of crimes.

4. The Interrogation Room

The room chosen for the interrogation should provide freedom from distractions. Secondarily, it should not be designed to give encouragement to the suspect. The following ideal requirements are listed with these two principles as a basis:

a. *Privacy.* Interruptions dispel an amtosphere that may have been carefully created by the interrogator, hence, the following are desirable:

1) *One door.* Several doors suggest possible interruption and destroy the feeling of inevitability.

2) Absence of windows or view.

3) Sound-proofing.

4) Telephone without bell.

b. *Simplicity.* Distracting influences should be kept to a minimum. The suspect may strive to avoid the investigator's concentration by focusing his attention on some object in the room which suggests a different train of thought.

1) Medium sized room.

2) Bare walls. Pictures and charts are distracting.

3) No glaring lights.

4) Minimum furniture.

c. *Seating Arrangement.* The suject and the investigator should be seated with no large furniture between them.

1) *Chair.* Armless, straight-back chair for the suspect.

2) *Table or Desk.* The investigator requires a flat surface on which to place papers and articles of evidence.

3) *Suspect.* Seating the suspect with his back to the door further deprives him of any hope of interruptions or distraction.

d. *Technical Aids.* Although the investigator should be alone with the subject, it is desirable to have facilities for others to observe and hear the suspect during the interrogation. Other investigators may suspect the subject of participation in other crimes. Thus the interrogation room can also serve as a line-up or show-up room. In an important case the investigator will require the assistance of his associates. By their listening unobserved to the interrogation they may be able to make useful suggestions and draw more objective conclusions. Persons such as the prosecuting attorney will find this opportunity to observe the prospective defendant invaluable in preparing his case. Victims and complainants are enabled to make identifications.

1) *Recording Installation.* Important interrogations and confessions should be recorded.

2) *Listening Device.* A hidden microphone such as a "live" telephone should be installed.

3) *Two-Way Mirror.* This device appears to be a plain mirror on one side but permits a person on the other side to see through without being observed. Unfortunately the typical two-way mirror installation is obvious and is familiar to the experienced criminal. A more deceptive arrangement can be devised with a little ingenuity. A framed picture with a mirror strip border is less familiar.

A medicine chest with a mirror door will pass unnoticed if a small sink is installed beneath it.

5. Selection of Technique and Approach

In the work of an interrogation, the principle of economy of means should guide the investigator. The simplest approach is best if it achieves the desired result. The interrogator should not be unnecessarily devious. He may outwit himself with his own cleverness or antagonize the subject by creating an unwanted confusion. Ingenuity is desirable when it is required, but it should not be considered as a satisfactory substitute for intelligence. The interrogator must first classify or analyze his subject with the aid of information or criminal records. A preliminary interview will often assist in determining the character and personality of the suspect and in planning the techniques to be used. With experienced criminals, the methods described under *Anxiety* and *The Stern Approach* are more effective, since although this type of person may not be reached by an emotional appeal he will accede to the logical cogency of the case that has already been built up against him by the investigator. With first offenders and those subject to feelings of regret, repentance, and mental anguish, a direct appeal on a friendly basis is more effective. Failing this, they may experience fear and apprehension if the interrogator expresses himself in terms of official indignation. As a general rule, the investigator will find that the direct, friendly approach should be tried first and a gradual progression can be followed to the more complex techniques. This must be qualified by the observation that some of the techniques, such as the pretense of physical evidence, can lose their effect if they are applied at the wrong stage of the questioning. The subject may develop a doubt as to whether there is a strong case against him if widely varying techniques are used. The interrogators should never reveal the weakness of their position by haphazardly testing different techniques. The methods should

be applied economically and with careful planning. It is important to restrict the questioning to at most two interrogators. A multiplicity of interrogators results in neutralizing the effects of various techniques.

6. Interrogation Techniques

There are many techniques of interrogation which the investigator can employ. His choice should depend on the nature of the crime under investigation, the character of the subject and on his own personality and limitations. The following are some of the techniques practiced by experienced investigators.

a. *Emotional Appeals.* The investigator must create a mood that is conductive to a confession. To place the subject in the proper frame of mind, he should provide emotional stimuli that will prompt him to unburden himself by confiding. In achieving this aim, the interrogator must combine the qualities of an actor and a practical psychologist. He must be able to roughly analyze the subject's personality in a short time; decide what motivation would prompt him to tell the truth; and then provide those motives by appropriate emotional appeals.

1) *Sympathetic Approach.* The suspect may feel the need of friendship. He is apparently in trouble. An offer of friendship accompanied by small acts of kindness may win his cooperation. The interrogator understands the plight of the subject. He appreciates the fact that even fellows like the subject become involved in difficult situations. He is ready to listen to the subject's story of his early life and its lack of opportunities. He understands how easy it is for a fellow to become a victim of drink or narcotics. He knows that the subject has merely used bad judgment in the affair and certainly would never again become so involved. Perhaps if he and the subject were to discuss the matter freely they could find an explanation.

After all, it is really a misunderstanding that has arisen. Unfortunately, the affair is technically a violation of the letter of the penal code and the police must comply with certain regulations. We could keep this unpleasantness to a minimum by a candid discussion of the whole affair.

2) *Kindness.* The investigator has appraised the personality of the subject and finds him a normal person in his desire for consideration. Kindness is in order. The investigator knows what it is to be in a spot. How about the family—the subject's mother, wife, or children? Is there anything the subject would wish the investigator to do for them? The subject's employer? The subject's property? His car, for example? Obviously, the subject and the investigator can get along together. Perhaps the investigator can assist the subject in his personal problem? There is no limit to the things that can be achieved by cooperation. We are not alone in this world.

b. *Friendliness.* The simplest of techniques is to assume that the suspect is willing to confess if he is treated in a friendly spirit. This treatment may take several forms which although similar to the emotional appeals described above are not as simple and direct.

1) *The Helpful Advisor.* The investigator is the subject's friend. Between the two of them they are going to straighten things out. The subject is bewildered by the recent happenings. If he explains the whole thing from the beginning, his friend, the investigator, will try to advise him. The investigator understands the law, the district attorney, and police procedures. Who is in a better position to help the subject?

2) *The Sympathetic Brother.* The subject needs to square things with his own conscience. For the sake of his family and himself, he should make a clean breast of the affair. His friend the investigator has seen other persons in similar circumstances. He knows the suspect is

seeking, above all, to achieve peace of mind. He has his whole life ahead of him. With the help of the investigator, he can take the first long step toward rehabilitation—recite the present story from the beginning and reason out the future steps with this as a basis. The investigator wants to give the suspect a chance to help himself.

3) *Extenuation.* The investigator does not take too serious a view of the subject's indiscretion. He has seen a thousand people in exactly the same situation. A rash step taken in an unguided moment; hasty action prompted by other people's advice. Perhaps if the suspect were to give the details of this unfortunate incident, his friend, the interrogator, could present the affair in its true light.

4) *Shifting the Blame.* Obviously, the subject is not the sort of person that is usually mixed up in a crime like this. The interrogator could tell from the start that he wasn't dealing with a fellow who was a criminal by nature and choice. The trouble with the suspect lies in his little weaknesses—he likes drink, perhaps; he is excessively fond of girls; or he has had a bad run of luck in gambling. These things can happen to anyone. Particularly in the present case. The circumstances practically pushed the suspect into the crime. If the subject and the interrogator were to work together, they could present this thing as it really is—a mistake that could happen to anyone. If the complainant and the judge could be assured that the subject was making a clean breast of it and was at least a decent fellow, it is quite possible they would take a different view of the matter. As it is now, there is enough proof to convict him and there is nothing to show the *true* facts of the case. Now if they were to hear the *whole* story . . .

5) *Mutt and Jeff.* In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to

send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room.

c. *Anxiety.* The suspect is in a state of emotional confusion. He is unable to think logically and clearly, since his sense of values has been disturbed and his imagination is distorting perspective. It is possible for the investigator to obtain admissions or even a confession from the suspect by further misrepresenting the picture.

1) *Exaggerating Fears.* The interrogator persistently points out that the subject "cannot win." There has never been a perfect crime. The longer he gets by with petty offenses, the more likely it is that he will commit a serious crime and suffer a severe punishment. The subject should consider the damaging effect such action will have on his family. His continued silence will undoubtedly affect his loved ones. The interrogator understands that the subject has no fear for himself, but he must have some thought for his friends or relatives. Their good name and future are at stake.

2) *Greater and Lesser Guilt.* In most crimes, there are several offenses involved. Although the investigator is only concerned with the major offense, he can represent himself as being interested mainly in a minor offense. The subject, who is afraid only of the consequences of the major offense, may resort to cleverness and in an attempt to throw the interrogator off the track or at least to placate him by

throwing him a bone, may confess to a minor offense. Once he has committed himself to this, the ice has been broken and persistence should bring forth a confession of the major guilt. It must be stressed to the suspect that since he has lied about the lesser offense, it is obvious that he has lied about the greater.

3) *Knowledge Bluff.* The interrogator reveals a number of pertinent items of evidence which are definitely known. He is thus able to convince the subject that it is futile to resist since the interrogator obviously has sources of knowledge. The interrogator should prepare himself for this approach by learning a great number of facts about the crime in question and about the subject's background. He must create the impression that he possesses an unlimited store of knowledge. This is not too difficult if the subject is confused and is normally not too bright.

4) *The Line-Up.* Certain crimes such as assault, forgery, and robbery involve an identification. The witness, complainant, or victim is requested to recognize the subject. During a break in the interrogation, the subject is placed among a group of men for a line-up. The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party. He may stress a particular feature for emphasis. The interrogation is resumed as though there were now no doubt about the guilt of the subject. Now it is merely a question of the subject helping himself by "cooperating."

5) *Reverse Line-Up.* This technique is applicable in crimes which ordinarily run in series, such as forgeries and muggings. The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations.

6) *Bluff on a Split Pair.* This is applicable where there are accomplices. The two suspects are separated and one is informed that the other has talked. Another variation, one which is less likely to run aground as a bluff, is to obtain individual, detailed stories from each suspect, no matter how fanciful or erroneous they may be, and to play the discrepancies against each suspect's story. A stronger form of this technique is to pretend to the suspect that his accomplice is placing all the blame on him. It is then suggested that the suspect would be foolish if he did not protect himself by telling the truth. Inbau describes an effective form of playing one suspect against the other. Let us assume that there are two suspects, *A* and *B*, and that *A* has been interrogated without success. *A* is then seated in the outer office which is occupied also by a busy stenographer. *B* is taken into the interrogation room and we shall assume that he too is unsuccessfully interrogated. The interrogator orders the stenographer to come into the interrogation room with his pencil and notebook. After an appropriate period of time, the stenographer returns and begins to type from his notes. Various touches of realism are added. The stenographer wishes to know *A*'s address; he is requested to hurry, since signatures are needed. Subsequently, *A* is returned to the interrogation room which *B* has now left. He is viewed with a grave silence. The interrogator opens with: "I don't think we'll need any confession from you, but if you want to clear up a few points. . . ." He is then asked to verify one or two points about which the interrogator has certain knowledge.

d. *The Stern Approach.* A cold, aloof attitude may sometimes produce the desired results. Techniques classified under this heading are often designed to induce the effect of anxiety as described in the preceding paragraphs. Many types of suspects are in fear of the police and the police station. Their confidence is shaken if they are faced by a stern investigator. His very coldness upsets any pre-

conceived notions of "kid gloves" treatment. A judicious application of the following techniques may induce dismay and cause him to plead with the interrogator. They should, however, be used only if it is highly probable that the subject is guilty.

1) *Pretense of Physical Evidence.* The interrogator states that he does not need any confession and isn't particularly interested in the suspect's reasons. There are, however, a few formalities he must go through. He is required to inform the suspect of certain findings and give him an opportunity to explain certain evidence. The interrogator then pretends that certain physical evidence, appropriate to the case, has been found by laboratory experts. The average person has mystical notions of the power of scientific crime detection and will accept practically any claims that science may make. Thus the detective can mix pseudoscience in his statements. In a hit-and-run case, for example, the interrogator can suggest that blood has been found on the car and that the laboratory experts have determined it to be the victim's blood. In a homicide, the interrogator can refer to hair found at the scene of the crime, which can be shown, under the microscope to be the suspect's hair. For added realism, the suspect can be invited to look into the microscope. In a document case, such as a forgery or a threatening letters case, a comparison of handwriting can be represented as being conclusive. Fingerprints are the most effective form of evidence. The layman believes that they can be left on any object. The investigator should select some object which was known to have been touched and should face the suspect with the object. It does bear fingerprints and the fingerprints have been photographed. The interrogator can show at a discreet distance a small photograph of a latent fingerprint. The imaginative investigator can create his own dramatic effects such as having the interrogation interrupted by the delivery of a message to the effect that the fingerprints on the

weapon have been identified, or that the handwriting has been positively compared.

2) *Jolting.* This device is especially useful when dealing with a person unusually calm or nervous. The questioning is conducted at some length in a quiet, almost soothing manner. By constantly observing the suspect, the investigator chooses a propitious moment to shout a pertinent question and appear as though he is beside himself with rage. The subject may be unnerved to the extent of confessing. If he appears moved, the interrogator will work him up to a pitch with a climactic series of questions.

3) *Indifference.* The investigator is not particularly interested in the subject. The subject's conviction is treated as a *fait accompli.* There are witnesses and physical evidence. There is an absence of an alibi. The subject's behavior during the period in question is an open book to the police. To accomplish this effectively, the interrogator should discuss the case with another investigator in the presence of the subject. The purpose of the discussion is ostensibly to determine whether they can obtain a conviction for a greater crime or whether they can obtain the maximum sentence. They review the case by putting the worst construction on every aspect and expressing their annoyance at being put to this inconvenience. The aim, of course, is to induce the subject to plead with them. Only with extreme reluctance do they give any consideration to his pleas. Gradually, they become more "reasonable."

4) *Questioning as a Formality.* In this technique, the interrogator asks a series of questions as though it were a necessary formality in his routine duty. He give the impression that he knows the answer, but that he is required to ask the question in consideration of the rights of the accused. The procedure is business-like, but the interrogator pauses meaningfully as if to give the suspect *one more* chance to tell the truth. Such phrases as the following can

be used; "You were in the apartment at seven o'clock, weren't you?" "You're sure about this fact?" "Do you want me to write your answer exactly the way you said it?" "I'm going to give you a fair chance to answer this question truthfully. Think it over for a while; then, give me your answer." When the answer is not that which the interrogator expects, he puts down his pencil skeptically, looks at the suspect, stares at his note pad and shakes his head ruefully. He may make some remark such as, "I don't know what you're trying to do to yourself," or "You think you'd give yourself a break." A prolonged silence will work with equal effectiveness.

5) *Affording an Opportunity to Lie.* This technique is useful when the interrogator has used direct questioning about the crime without success. It is lengthy, time-consuming and involved, but it serves the purpose of wearing down the subject. Questions directly concerning the crime are avoided. In a cold methodical manner the interrogator first asks for detailed information concerning the subject's background. If he has knowledge of some indiscretion, he dwells around the event in great detail. He then proceeds to the activities of the subject before and after the crime in question. He goes into minute details concerning money, movements, and conversations. He repeats and re-examines until he has built up a complete structure. He supports his questioning with his own knowledge of certain facts or events. Having reached this point, the investigator leans back and in a relaxed tone, invites the subject to tell in his own words all that he knows about the offense, the victim, the complainant, possible suspects, and the circumstances surrounding his involvement in the case. From all of this information, a capable investigator will be able to detect weak points such as lies, inconsistencies, improbabilities, and gaps. He should be patient, methodical, and aloof, willing to go over the events again, step-by-step and in minute detail in order to "get the facts straight" for his report.

The subject will, ordinarily, continue to answer questions, since he cannot know that all this information is not necessary for an investigative report. He is willing to assist the interrogator in developing his report. The interrogator gives the impression that he is not interested in guilt or innocence; he wishes only to obtain details for his report. No person, obviously, should prevent the police from accomplishing their report by refusing to answer routine questions. Finally, the investigator will have acquired an immense, complex, but not quite coherent structure of facts, data, descriptions, and events. It should not be difficult to discover a number of lies in this welter.

At a "psychological moment" when the subject appears confused and dispirited another tack can be taken. The investigator can suddenly become overwhelmingly indignant, throw down his pad and pencil and demand the truth forthwith. On the other hand an associate investigator can take advantage of a pause, in private, to suggest to the suspect that he can "straighten things out" by forgetting all these details and getting down to a few simple admissions. Alternatively, the detailed questions can continue and the discrepancies can be pointed out in an assured and determined manner.

7. Control

One of the first lessons to be learned by the inexperienced investigator is the unfortunate ease with which he can lose control of the interrogation. As he questions the suspect, unexpected answers are received and his strategy is pushed off its course. Startling emotional reactions on the part of the suspect may upset him. He may become impatient in the face of obstinacy or angry with the appearance of impertinence. With the tone of the interrogation changed and the sequence of his presentation altered, he may find himself caught in a discouraging stalemate. Although experience will remedy these defects, initial train-

ing according to sound principles will enable him to avoid the pitfalls at the outset.

a. *Initial Phase.* In the beginning of the typical interrogation the investigator has little need for control. The subject should be permitted to tell his story in his own way without interruption. A few general questions will lay the groundwork. Often the suspect, after he is once launched in his narrative, will work himself into a confession. At this stage the investigator should restrict himself to assisting the subject when there is an obvious need for a word or phrase.

b. *Questioning.* After the narrative phase of the interrogation, planned questions should be put to the subject. The tone of the interrogation will now be set by the responses of the subject. Spontaneous answers which appear to be given without much reflection are particularly valuable and trustworthy. If the subject appears to be cooperating, the investigator should endeavor to develop in him a pride in his cooperation.

c. *Emotion Control.* If the subject seems reluctant to cooperate, the investigator should make every effort to remain clean. A loss of temper will cut off the small trickle of information. Anger may swiftly lead to duress. The suspect, moreover, will sense his own superiority in remaining calm. Deliberate anger as a tactic in interrogation is, of course, a different matter. Harassing the suspect should ordinarily be avoided since it can result in false statements. It is always possible that the suspect does not have the information. The indifferent type may give the desired answer regardless of its truth merely to be rid of the oppression of the interrogator. Instead of yielding to feelings of contempt, impatience, sarcasm, or anger, the interrogator can find relief in putting his efforts into the expression of emotions or sentiments such as patriotism, motherhood, childhood, religion, or fidelity to ideals.

d. *Strategic Interruptions.* When the interrogator senses that he is losing control or that his tactics are availing nothing, it may be time to pause and do additional planning or introduce a new technique. The interrogation room should be equipped with a button and buzzer under the top of the desk, which the investigator can push with his knee or foot. In this way, he can sound the buzzer, pretend it is a signal for him and leave the room.

8. Physiological Symptoms

Careful observation of the physical state of the subject as influenced by his emotion will often give a clue to guilty knowledge or deception. The various symptoms observable in the subject are sometimes consistent with a state of nervousness as well as guilt. Physical manifestations can be pointed out to the suspect as evidence that his guilt is obvious. The following observations are generalities which may sometimes be useful, but which must always be modified in relation to the temperament of the individual.

a. *Sweating.* If the face is flushed, anger is indicated. Embarrassment or extreme nervousness may also be the case. A pale face indicates fear or shock. Sweating hands indicate tension.

b. *Color Changes.* A flushed face indicates anger, shame, or embarrassment but not necessarily guilt. A pale face is a more reliable sign of guilt.

c. *Dry Mouth.* Great nervous tension is present. This is considered a reliable symptom of deception. Swallowing, wetting of the lips, and thirst are indications of dryness of the mouth.

d. *Pulse.* An increase in the rate of heart beat is indicative of deception. The pulse beat is observable at times in the veins of the neck.

e. *Breathing.* Deception is indicated by an effort to control breathing during critical questions.

9. Perseverance

In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable.

10. Special Groups

Two groups of offenders deserve special mention here because of the relative ease with which they may be induced to make confessions if they are interrogated with a moderate amount of skill.

a. *The Juvenile.* Two classes must be distinguished: the indignant offender with bad character and disreputable background and the person who comes from a "good family." The expressions "criminal" and "non-criminal" type will be employed.

1) *Non-Criminal Type.* The boy (or girl) has been raised to believe in moral principles and to respect authority, but is a little wild and has yielded to temptation; he is rarely intelligent and his inexperience makes him gullible.

He is susceptible to emotional appeals by reason of his training and "believes" in so many things that the investigator has a wide choice of methods by which to motivate him. "Mother" is a magic word for inducing a state of repentance and a desire for confession. Since the boy is usually frightened at the outset, the investigator can rely on a friendly approach and an emotional appeal.

With a headstrong boy, an investigator should carefully avoid humiliating him by compromising his courage or pride. Lacking common sense and being careless of the consequences, he may rebel at an affront and remain obdurate. A friendly appeal to his manhood is effective. Is he man enough to admit his guilt? What would his mother think of him? How can he and the investigator cooperate so that mother won't be hurt? What should we tell mother?

2) *The Criminal Type.* Where poverty and bad environment have wrought their scars on the boy's character, the investigator's greatest problem is prevarication. The lie is an integral part of the mode of the subject's thinking. Another difficulty is a reluctance to become a "stool pigeon," attended by a heroic silence. An aggravated form of this attitude is an excessive dislike of "cops." The fine arts of detective fiction and mystery cinema have inculcated in the boy the notion that there is no profession lower than that of the cop. The police officer is his natural enemy.

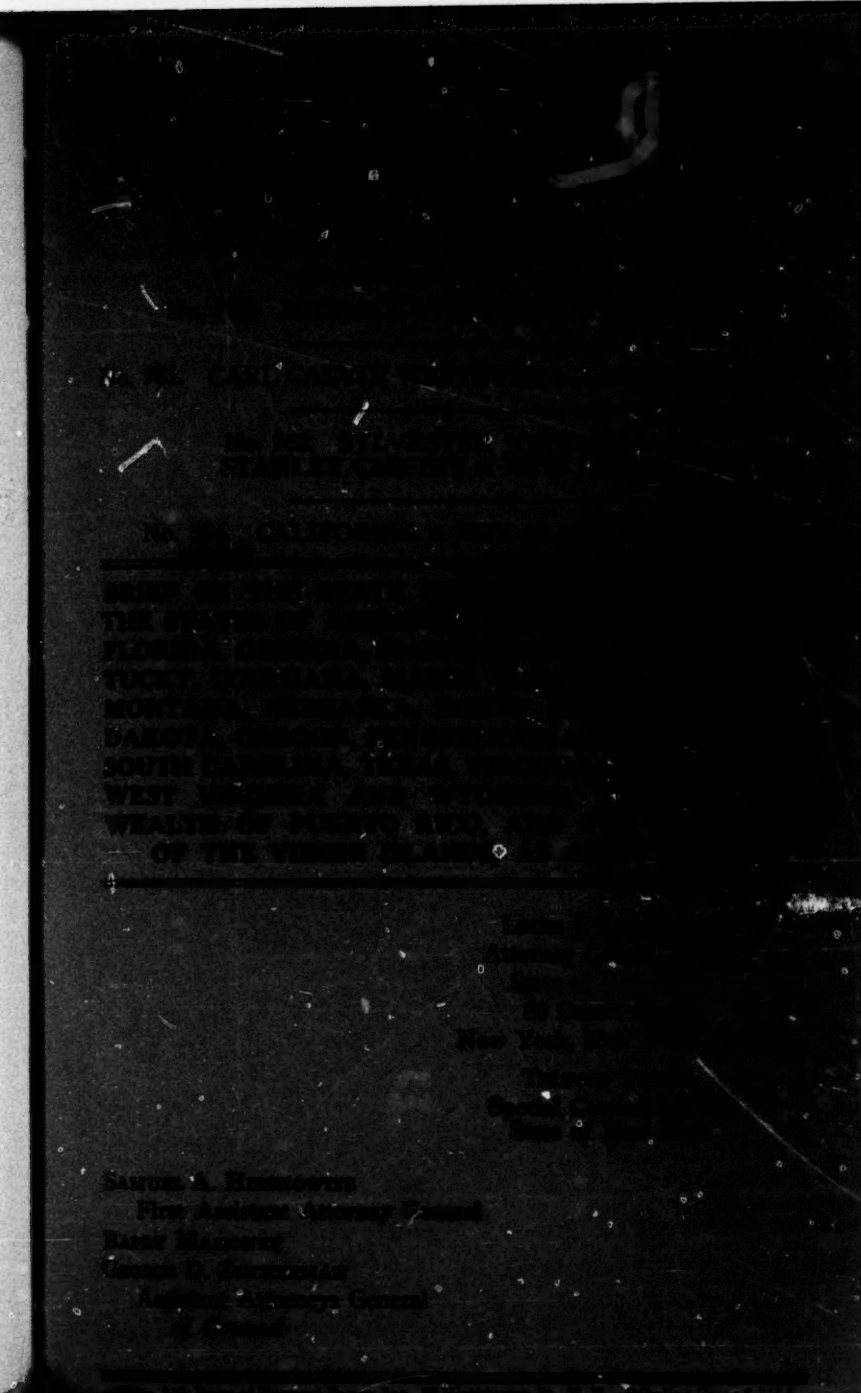
Although emotional appeals are far less effective with this type of subject, they should be given a trial at the outset. The friendly approach should be used throughout. The utmost care must be exercised to avoid permitting the boy to assume the role of a martyr. If the investigator is harsh, fancied martyrdom is simple to conjure up. On the other hand, where the investigator is persistently friendly, even to the point of fatuity, the boy will feel foolish in maintaining an air of a rebel without a cause. The stern approach should be used as a last resort.

The investigator must rely heavily on the tactic of trapping the subject in ridiculous lies. The boy has no desire to lose face in such an ignominious way as being repeatedly caught in contradictions and inconsistencies. After he has been caught in a number of lies, it should be suggested to him that he "smarten up." Naturally, in the half-fictional world that he mentally inhabits, it is of the utmost importance to be "smart." Not even the movies admire the "dumb" thug.

The appeal to his pride in being "smart" should be used again by pretending that his friends or accomplices have "talked" and told everything. Is he going to hold the bag? Since Bogart, Cagney, Robinson and Raft are never seen holding the bag, there is little likelihood that the subject will fancy himself in such a position. He will wish to "get revenge on them." With the aid of the investigator, this is a relatively simple matter. After all, the investigator has no desire to see his friend, the subject, shouldering all the blame.

b. *"White Collar" First Offenders.* This category includes persons such as the grocery clerks or bank cashiers who came from "poor but honest" parentage; middle-class offenders such as office managers and owners of small businesses; military officers; teachers; civil service workers; and other groups who are traditionally known to subscribe to orthodox ethical principles and conventional moral standards. The crime is usually larceny by theft, forgery, or embezzlement. Rarely it is murder or robbery. It is not difficult to obtain a confession. The personal dignity and pride of the subject must be respected. If these are assaulted by a crude remark, the subject may rebel and remain obstinate. The calm, dignified approach of a physician will lull the subject's fears and lead him to believe that if he cooperates the road will be smooth. Since he is usually naive and knows little of the seamier side of life, his conception of his fate will be unrealistic. The investi-

gator should begin with the "Dutch Uncle" approach. His job is to help people in trouble. He has seen cases like this before and things have worked out smoothly. He knows what the subject has done; that's a thing of the past. "Let's see what we can do about the future. First of all, we'll clear the decks. Tell us in your own words what happened and give us everything that's in your favor so that we can do what we can for you. And stop worrying. Let us do the worrying about the case. If we all cooperate, we can get somewhere." A psychological "lift" such as this is like a sedative before an operation. Things aren't half as bad as he had imagined them. It's good to find that they have intelligent men on the police force. . . . The character of a person in this category is weak, and this defect must be exploited fully.



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Supreme Court of the United States

OCTOBER TERM, 1965

No. 759

ERNESTO A. MIRANDA, Petitioner,

against

THE STATE OF ARIZONA, Respondent.

No. 760

MICHAEL VIGNERA, Petitioner,

against

NEW YORK, Respondent.

No. 761

CARL CALVIN WESTOVER, Petitioner,

against

UNITED STATES OF AMERICA, Respondent.

No. 762

SYLVESTER JOHNSON and STANLEY CASSIDY, Petitioners,

against

NEW JERSEY, Respondent.

No. 584

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,

against

ROY ALLEN STEWART, Respondent.

BRIEF OF THE STATE OF NEW YORK, JOINED BY THE STATES OF ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, IDAHO, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MISSOURI, MONTANA, NEBRASKA, NORTH CAROLINA, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, TEXAS, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING, THE COMMONWEALTH OF PUERTO RICO, AND THE TERRITORY OF THE VIRGIN ISLANDS, AS *AMICI CURIAE*

Interest of the *Amici*

The petitions for certiorari in the above cases raise such questions as whether criminal suspects must be advised, prior to arraignment, of a right to be silent or of a right to have counsel; whether counsel must be furnished to suspects upon request, or even in the absence of request; whether pre-arraignment statements of an accused taken in the absence of counsel must be excluded at trial; and whether newly-established constitutional rules limiting the admissibility of statements made by a defendant prior to his arraignment must be applied retroactively.

The interest of the Attorney General of the State of New York in these questions is substantial. As the chief legal officer of the State of New York (N. Y. Executive Law § 63), the Attorney General is concerned with maintaining a fair balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice. In pursuance of these purposes the New York Attorney General has actively cooperated with the State's Commission on Revision of the Penal Law and Code of Criminal Procedure, and has himself initiated and sponsored legislation aimed at raising the State's standards of criminal justice.[1]

As a prosecuting officer in specified areas of criminal conduct, and as an advisor to the district attorneys of the State and to the State's judicial officers, the New York Attorney General is likewise cognizant of the huge volume of

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[1] See, *e.g.*, N. Y. Laws of 1965 c. 878, establishing a requirement that every county provide counsel for indigents charged with crime, misdemeanors as well as felonies, and requiring the counties to provide expert, investigative and other services necessary for an adequate defense.

criminal cases handled by the New York courts[1] and of the fact that the questioning of suspects in criminal cases, particularly in cases involving serious felonies, has often been of significant assistance in the solution of crime.

In addition, the New York Attorney General, as counsel to the officers of state correctional institutions who are named as respondents in writs of habeas corpus, is concerned with the seriously disruptive effects upon the administration of justice which would inevitably flow from a retroactive application of new exclusionary rules limiting the admissibility of pre-arraignment statements.

The other Attorneys General subscribing to this brief are charged with similar duties and are equally concerned with these issues. Mindful of the precedents that these cases may establish with regard to pre-arraignment procedures in every State, the States of Arizona, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Washington, West Virginia and Wyoming, the Commonwealth of Puerto Rico, and the Territory of the Virgin Islands join the State of New York in presenting their position in this brief *amici curiae* filed with the Court pursuant to Rule 42.

Questions Presented

Since this brief is not filed in support of either affirmance or reversal of any of the five cases to which it re-

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[1] For example, in 1963, the Supreme Court and County Courts of New York disposed of the cases of 19,888 criminal defendants charged with felonies and misdemeanors. 10 N. Y. Judicial Conference Ann. Rep. 416 (1965). This figure does not include 452,271 felonies and misdemeanors handled in inferior courts in 1963, nor the several million summary offenses—mostly traffic violations—disposed of in New York every year. 10 N. Y. Judicial Conference Ann. Rep. 204-07, 418-19 (1965).

lates, the questions are stated in general terms, rather than in the factual framework of any of the cases:

1. Whether an arrested suspect's lack of the assistance of counsel at the time he makes a pre-arraignment statement renders the statement constitutionally inadmissible at his trial.[1]

2. Whether rules presently or hereafter established within the ambit of the first question should be retroactively applied.

Summary of Argument

I

We oppose the establishment of new constitutional restrictions on the admissibility of pre-arraignment statements made in the absence of counsel. Neither the literal text nor the originally intended meaning of the "Assistance of Counsel" clause of the Sixth Amendment comprehend pre-adjudicatory stages of criminal procedure. Extension of the clause to pre-arraignment proceedings must therefore depend on a showing that such extension is required by developing concepts of fairness beyond the ambit of the original understanding. In fact, no such showing has been made. Therefore the holding of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), should not be made the basis for a general exclusionary rule of constitutional dimension.

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[1] The five cases present this question under varying attendant circumstances. See note 2, *infra*, page 11. As used in this brief, the term "arraignment" refers to the individual's first appearance before a judicial officer subsequent to his arrest. New York law requires that the magistrate before whom the individual is brought inform him at this time, and before any further proceedings are had, of his right to the assistance of counsel; and that, if he desires counsel but is financially unable to obtain counsel, then counsel will be assigned. See N. Y. Laws of 1965, c. 878, amending N. Y. Code Cr. Proc. §§ 188, 190 and 699.

This Court has repeatedly recognized the importance of pre-arraignment interrogation in the law enforcement process. See, *e.g. Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Empirical evidence now in hand affords no basis for challenging this evaluation. The Court has also recognized the hindrances which would be caused by a general requirement of counsel at the pre-arraignment stage. *Cicenia* v. *LaGay*, 357 U. S. 504, 509-511 (1958). Adoption of the exclusionary rules urged by defendants in these cases would result either in the virtual elimination of pre-arraignment interrogation, or the large scale installation of defense counsel at police stations, or both of these consequences in unpredictable proportions. Empirical evidence justifying such consequences is lacking, and neither professional nor general public concepts of fairness warrant a constitutional requirement of such fundamental changes in pre-arraignment procedures.

Procedural development in this area should take place in non-constitutional terms. State courts and legislatures, and professional organizations such as the American Law Institute, are currently and closely concerned with pre-arraignment procedures, and are alert to the need for mitigating the legal disadvantages of the indigent and uneducated. Progress toward this end, with due regard for the needs of law enforcement, will be surer with the effective participation of these agencies.

II

To whatever extent new exclusionary rules may be established in these cases or may be deemed already established by *Escobedo* v. *Illinois, supra,* such rules should not be given retroactive application. The same considerations which militated against retroactive application of newly established rules barring the admission of illegally seized evidence (*Linkletter* v. *Walker*, 381 U. S. 618 [1964]) and prohibiting adverse comment by a trial judge upon a defendant's failure to testify at a criminal trial (*Tehan* v.

Shott, —— U. S. ——, 34 U.S.L. Week 4095 [1965]) weigh heavily against retroactive application of any new rule limiting the admissibility of pre-trial statements which are not shown to have been involuntary.

There can be no doubt but that, at least prior to the decision in *Escobedo* v. *Illinois*, there was considerable and justifiable reliance by the state judicial systems upon this Court's earlier decisions establishing voluntariness as the criterion governing admissibility of a defendant's inculpatory pre-trial statement. See, *e.g.*, *Crooker* v. *California*, 357 U. S. 433 (1958). For this Court to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that state courts and prosecutors should not have used evidence which this Court had previously told them was admissible.

The primary purpose of any new exclusionary rule limiting the admissibility of pre-trial statements would undoubtedly be to prevent police coercion and ensure that an individual's privilege against self-incrimination remains meaningful. Retroactive application would not further this purpose, however—to the extent that an exclusionary rule is an effective deterrent to police misconduct, it is because the police, after the establishment of such a rule, may be expected to act with knowledge of its sanctions. Nor would the policy of protecting the innocent be furthered by retroactive application—to the extent that the absence of counsel may have contributed to the making of an involuntary and hence possibly unreliable statement, relief is already available. See *Reck* v. *Pate*, 367 U. S. 443 (1961); *Fay* v. *Noia*, 372 U. S. 391 (1963). Judicial integrity would be diminished by such an application, since the precedental value of court decisions would be seriously undermined. Retroactive application of new exclusionary rules would not be conducive to the orderly administration of criminal justice either. Numerous old convictions would be reopened and persons convicted of serious crimes, on

reliable evidence of their guilt, would be the principal beneficiaries.

Retroactivity would also be likely to impose serious restraints upon the progressive development of new rules by the state courts. Surely one important reason why some state courts have felt free to establish new exclusionary rules has been their reasonable expectation that the new rules would not affect past cases in which convictions have become final. In addition, retroactive application would impose serious strains on the resources of the bench and bar in all the states, to the detriment of those individuals who have more deserving claims for post-conviction relief and to the detriment of the social interest in meeting pressing problems in other areas of criminal law.

Argument

The first of the two questions to which this brief is primarily addressed is raised in various forms and factual settings in all five of the instant cases, and the second question in No. 762, *Johnson and Cassidy* v. *New Jersey*. Although they are disparate in important respects, the two questions are closely interlocked, in that the reasoning and conclusions adopted for the first may well affect if not govern the answer to the second.

A basic part of our position on both of these questions is the proposition that the constitutional claims asserted in these cases are part of a developmental process rather than an "original understanding".[1] Accordingly, we be-

[1] Compare the conflicting approaches to the "original understanding" of the Fourteenth Amendment in Mr. Justice Black's dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 68-123 (1947), and Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 Stan. L. Rev. 5 (1949). Assuming (in line with Mr. Justice Black's position) "total incorporation" of the Sixth Amendment in the Fourteenth, we think it clear (*infra*, pp. 15-17) that the original understanding of the "Assistance of Counsel" clause did not comprehend the claims asserted here.

lieve that the Court may and urge that it should take full account of contemporary factors in determining whether, when, and how much to expand the constitutional dimension of the right to counsel in the pre-arraignment stage of a proceeding. Our assessment of these factors comprises the main body of this brief.

I

The Court should not presently enlarge the constitutional dimension of pre-arraignment rights to the assistance of counsel.

The constitutional test to be applied in determining the admissibility of confessions was restated by this Court, speaking through Mr. Justice Goldberg, in *Haynes* v. *Washington*, 373 U. S. 503, 513:

> "'[T]he question in each case is whether the defendant's will was overborne at the time he confessed' *Lynum* v. *Illinois*, 372 U. S. 528, 534. 'In short, the true test of admissibility is that the confession is made freely, voluntarily and without compulsion or inducement of any sort.' *Wilson* v. *United States*, 162 U. S. 613, 623. See also *Bram* v. *United States*, 168 U. S. 532. And, of course, whether the confession was obtained by coercion or improper inducement can be determined only by an examination of all of the attendant circumstances."

The application of this test resulted in reversal of the conviction in the *Haynes* case upon the Court's conclusion that the interrogation of the petitioner while under detention for sixteen hours, the denial of his requests for counsel, and the refusal of the police to permit petitioner to telephone his wife until he signed a confession, demonstrated the involuntariness of the confession.[1]

[1] Other recent instances in which this Court has set aside convictions upon determining that the confessions in question did not meet the test of "voluntariness" include *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Culombe* v. *Connecticut*, 367 U. S. 568 (1961); *Reck* v. *Pate*, 367 U. S. 433 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960); and *Spano* v. *New York*, 360 U. S. 315 (1959).

The following year in *Escobedo* v. *Illinois*, 378 U. S. 478, this Court considered the admissibility of a pre-arraignment statement in the context of the Sixth Amendment guarantee of the right to "the assistance of counsel".[1] The scope of that decision has been the subject of numerous and conflicting decisions in both State and Federal courts[2] and extensive discussions in legal periodicals.[3]

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[1] To whatever extent that case is deemed to establish a "new" rule concerning the admissibility of confessions, a problem of retroactivity is raised, which is discussed in Point II of this brief.

[2] See, *e.g.*, *State* v. *Miranda*, 98 Ariz. 18, 401 P. 2d 721 (1965), *cert. granted*, 86 Sup. Ct. 320; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288 (1965); *State* v. *Worley*, 178 Neb. 232, 132 N. W. 2d 764 (1965); *Bean* v. *State*, 398 P. 2d 251 (Nev. 1965); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964), *cert. denied*, 380 U. S. 961; *Anderson* v. *State*, 237 Md. 45, 205 A. 2d 281, 285 (1964); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669, 678 (1964), *cert. denied*, 379 U. S. 1005; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169 (1964), *cert. denied*, 379 U. S. 1004; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa 1964); *Galarza Cruz* v. *Delgado*, 233 F. Supp. 944 (D.P.R. 1964); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *Commonwealth* v. *Negri*, 213 A. 2d 670, 672 (Pa. 1965); *Commonwealth* v. *McCarthy*, 200 N. E. 2d 264 (Mass. 1964); *Campbell* v. *State*, 384 S. W. 2d 4 (Tenn. 1964); *United States* v. *Cone*, —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965, slip op. p. 3391); *United States* v. *Drummond*, —— F. 2d —— (2d Cir., dec'd Dec. 2, 1965, slip op. p. 3225); *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *United States ex rel. Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, 86 S. Ct. 438 (1965); *Collins* v. *Beto*, 348 F. 2d 823 (5th Cir. 1965); *United States ex rel. Walden* v. *Pate*, 350 F. 2d 240 (7th Cir. 1965); *Jackson* v. *United States*, 337 F. 2d 136 (D. C. Cir. 1964).

[3] See, *e.g.*, Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965); Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure in* CRIMINAL JUSTICE IN OUR TIME (U. Va. Press 1965); Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 Boston Univ. L. Rev. 423 (1964); Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 Journal of Criminal Law, Criminology and Police Science 156 (1965).

Whatever may in other respects be the verdict of judicial history, we think that *Escobedo,* and other recent decisions of this Court in the field of criminal procedure, have had a beneficial effect insofar as they have awakened the interest and concern of bench and bar, legislators and executive officials, police and social welfare agencies to current and crucial problems of criminal law enforcement. In the forefront of those whose concern has taken the form of organized study and the formulation of practical proposals are the American Bar Association, the American Law Institute, and the New York Commission on Revision of the Penal Law and Code of Criminal Procedure.

Because the defendant in the *Escobedo* case had already retained a lawyer and had requested opportunity for consultation which the police had denied him, prior to his confession, the case is susceptible of narrow interpretation. Indeed, this Court's own statement of the holding is very particularly worded (378 U. S. at 490):

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment,' *Gideon* v. *Wainwright,* 372 U. S., at 342, 83 S. Ct., at 795, and that no statement elicited by the police during the interrogation may be used against him at a criminal trial."

We do not suggest that the *Escobedo* case be robbed of principled basis and practical effect by an overly meticulous insistence on its details. But we do read its holding, quoted above, as a warning that substantial variation in circumstances will require fresh consideration of the consequences. And we urge, for the reasons herein set forth, that the present cases should not be the occasion for any substantial expansion of its impact in the constitutional dimension.

These five cases (as well as a sixth to be heard later this term[1]) present a spectrum of questions closely related to those dealt with in the *Escobedo* case. As already indicated, it is not our purpose to seek either affirmance or reversal of any of these cases, for the reason that all five of them involve issues in addition to those of present interest to the *amici curiae*,[2] which may be determinative of their several outcomes.

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[1] *Davis* v. *North Carolina*, 339 F. 2d 770 (4th Cir. 1965), *cert. granted*, —— U. S. ——, 86 S. Ct. 438 (Dec. 13, 1965), transferred to appellate docket as No. 815, Oct. Term, 1965 (34 U.S.L. Week 3223).

[2] Thus No. 760, *Vignera* v. *New York*, involves a twenty-four hour period of detention prior to arraignment, from which petitioner projects arguments primarily derived from *McNabb* v. *United States*, 318 U. S. 332, and *Mallory* v. *United States*, 354 U. S. 449.

No. 761, *Westover* v. *United States*, likewise involves *McNabb-Mallory* questions, and furthermore is a federal court case, so that statutory and "supervisory" as well as constitutional factors are present. Other unrelated questions (evidentiary and procedural) are also raised.

In No. 762, *Johnson and Cassidy* v. *New Jersey*, petitioners have raised questions pertaining to self-incrimination through comment to the jury, severance, and improper prosecution argument and summation.

In No. 584, *California* v. *Stewart*, and No. 759, *Miranda* v. *Arizona*, in addition to the issues pertaining to the assistance of counsel, there are questions concerning the absence or adequacy of the warning given to the accused that he had a right to remain silent; these questions are likewise present in the *Vignera* case.

Rather, we wish to lay before the Court various considerations bearing on the role of *constitutional* decision-making in this complicated and contentious area. The inclusion in this group of cases of one (No. 761, *Westover* v. *United States*) from the federal judicial system underlines the distinction which, familiar though it may be, merits emphatic reiteration at this time. For in the *Westover* case (assuming that the unrelated evidentiary and procedural questions are not determinative) this Court must take account of federal statutory policy and its own responsibilities for supervision of the federal judicial process, and may find it wise to enunciate general federal rules derived from these sources.

In the other four cases, the Court should, we respectfully submit, give heed both to the limitations of the federal constitutional source and to the enduring impact and comparative inflexibility of constitutional decision-making. Accordingly, in the ensuing text, we invite the Court's attention to the historical content of the "Assistance of Counsel" clause; to the alarming paucity (soon, we hope, to be mitigated) of empirical data pertaining to the role of pre-arraignment interrogation in law enforcement and the probable effect of a general requirement that counsel be present at such interrogation; to the difficulties which courts and bar would encounter in meeting drastic new requirements of universal application; and to the importance of effective participation in the solution of these questions by legislative bodies, professional associations, and other official and private agencies importantly concerned.

A. Elements of the constitutional issue

The manner and extent to which the provisions of the Bill of Rights are "incorporated in" and made applicable to the States by the Fourteenth Amendment remains a matter of dispute within the Court.[1] In our approach to the

issues of these cases we assume, *arguendo*, that the Sixth Amendment guarantee of the right to the assistance of counsel applies in the same manner and with the same force to the States as to the Federal government, i.e., that in constitutional terms the right to counsel is the same under the Sixth and Fourteenth Amendments.[2] So regarded, some of the constitutional issues presented by these petitioners appear to be:

(a) At what point after the initial contact between a police officer and an individual in which the individual's knowledge of or connection with an actual or suspected crime is discussed does the individual have a constitutional right to the assistance of counsel?

(b) When the right described in (a) arises does the individual have a simultaneous or subsequent constitutional right to be effectively informed of a right to counsel?

(c) When the rights described in (a) and (b) have arisen and if the individual is unable, for financial or other reasons, to obtain counsel for himself, are the arresting authorities, either then or subsequently, constitutionally obligated to provide him with counsel?[3]

(d) Are statements made by an individual, at a time when his rights under (a), (b) or (c) have been violated, constitutionally inadmissible?

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[1] See the concurring opinion of Mr. Justice Harlan in *Ker* v. *California*, 374 U. S. 23, 44-45 (1963), and his dissenting opinion in *Griswold* v. *Connecticut*, 381 U. S. 479, 500. *Cf.* Mr. Justice Stewart's remark in *Massiah* v. *United States*, 377 U. S 201, 205: "Here we deal not with a state court conviction but with a federal case, to which the specific guaranty of the Sixth Amendment directly applies.

[2] There may, of course, be additional standards drawn from statutes or from this Court's judicial supervisory powers.

[3] It would appear to be established that the right to retain one's own counsel is at least somewhat more extensive than the right to have counsel supplied. *Chandler* v. *Fretag*, 348 U. S. 3, 9 (1954).

That these rights have attached in a constitutional sense at the time of trial was settled by *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). That they have attached at the time of any important pre-trial proceeding of a judicial nature is established by *Hamilton* v. *Alabama*, 368 U. S. 52 (1961) (arraignment), and *White* v. *Maryland*, 373 U. S. 59 (1963) (preliminary hearing). The issue raised by the present cases is whether they shall now be held to attach in whole or in part at some time prior to arraignment which (as earlier indicated) we use here not in a technical sense but as indicating the accused's first appearance before a judicial officer.

The *Gideon* case did not arise in the context of an exclusionary rule; deprivation of counsel was held to invalidate the entire proceeding. Trials and arraignments that are defective can be held again subject to correction of the errors but of course this is not true of pre-arraignment questioning. So far it has not been seriously suggested that lack of counsel in the pre-arraignment stages should vitiate the entire proceeding and immunize the suspect against prosecution. In contrast to the *Gideon* case, accordingly, the constitutional issues here stirred in the pre-arraignment stages are exclusionary in nature and are to be answered in terms of the admissibility of statements made by the accused during these early stages.

In approaching these issues the State of New York and the other *amici curiae* wish to emphasize their strong support for measures effectively designed to reduce the legal disadvantages which commonly afflict the poor and unsophisticated. There is deep and widespread need for better public education in the structure and detail of individual rights and for the provision of counsel for the indigent.

The question remains how far and in what ways the law in general and Federal Constitutional Law in particular can best contribute to those ends, in the setting of a so-

ciety in which other values, including the speedy apprehension of criminals and safety of the citizenry, also have an important place.

B. Historical factors and established practice

In No. 759, *Miranda* v. *Arizona,* the petitioner observes (Br. p. 11) that in these cases: "We deal . . . with growing law, and look to where we are going by considering where we have been." We think that it is indeed sound to recognize and wise to emphasize that this case does not concern any "original understanding" of the Sixth Amendment's guarantee of the right to assistance of counsel, and that the claims here asserted go far beyond the scope of that clause either as originally intended or as construed and applied during the intervening years.

There is simply no historical basis for the constitutional requirements now suggested, which would exclude all pre-arraignment statements made by a suspect where the state failed to furnish him with counsel. "Text, context and history of the Sixth Amendment lead to the conclusion that the framers were addressing themselves to judicial proceedings, where a person is obliged to defend himself in a process fraught with the technicalities and procedural niceties of the criminal law." *United States* v. *Cone,* —— F. 2d —— (2d Cir., dec'd Nov. 22, 1965; Slip Op. pp. 3391, 3399); see also Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 Calif. L. Rev. 929, 943-944, 946 (1965).

Shortly after proposing the first ten amendments to the Constitution, the First Congress on April 3, 1790 passed an act providing for the assignment of counsel only in trials for treason and other capital crimes. 1 Stat. 118, Rev. Stat. § 1034, now found in 18 U.S.C. § 3005. If the guarantee of the Sixth Amendment were regarded as imposing a duty on the part of a trial judge to assign counsel to the defendant in all criminal cases, this statutory provision

would have been superfluous. The obvious implication of such a statute was that the First Congress considered the courts to be under no legal obligation to appoint counsel in other than capital cases.

Indeed, as late as 1800, it appears that only in New Jersey by statute, and in Connecticut by practice, did the accused enjoy a full right to retain counsel in a criminal trial, and to have counsel appointed if he were unable to afford it. With the exception of these two states, the right to counsel was interpreted to mean the right of a defendant at a criminal trial to retain counsel of his own choosing and at his own expense. Beaney, THE RIGHT TO COUNSEL IN AMERICAN COURTS, 21 (1955). As Judge Friendly has written:

> "History leaves no doubt that the assistance of counsel clause was aimed at the practice that had grown up in England, whereby defendants charged with felonies other than treason could not have the aid of retained counsel at their trials with respect to issues of fact . . . The practice had been even more offensive in America where, in contrast to the mother country, professional prosecutors had to some extent come in vogue. At the time of the adoption of the Constitution, twelve states, as a part of their legal systems, had rejected the English rule. The counsel clause of the sixth amendment was intended to carry this forward; no one was thinking of the assignment of counsel . . ."[1]

Evolving concepts of fairness have made us aware that the assistance of counsel for one's defense is a fundamental right which should not be limited to enjoyment only by those who are rich enough to afford counsel or knowl-

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[1] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 943-44 (1965). See also Judge Friendly's concurring opinion in *Collins* v. *Beto*, 348 F. 2d 823 at 832, 837 (5th Cir. 1965).

edgeable enough to request it (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]; *Johnson* v. *Zerbst*, 304 U. S. 458 [1937]). However, the purpose of the right to counsel has always been essentially that expressed by Mr. Justice Sutherland in his historic opinion for the Court in *Powell* v. *Alabama*, 287 U. S. 45, 68-69 (1932):

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable generally, of determining whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon improper evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

This view of the purposes of having the assistance of counsel for one's defense was quoted with approval by the Court in *Gideon, supra*, at 344-45. The present proposals for an extension of the right to a stage prior to the commencement of judicial proceedings obviously envision quite different purposes.

The purposes of such an extension do not relate to guiding an individual through the technicalities of the legal process. Rather, they relate to the fear that an individual's privilege against compulsory self-incrimination and his right to the meaningful assistance of counsel at trial will be lost if counsel is not provided at a period prior to the formal institution of a prosecution, and to a desire to

assure equal treatment for rich and poor. Granted that the protection of these rights is of the utmost importance, the fact remains that other values must also be weighed. The dimensions of the problem were described by Mr. Justice Jackson in his concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49, 57 (1949) at 61-62:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

C. The materials of decision

We have stressed the past, not because it provides the answers to the issues raised in these cases, but because it reveals a process and suggests an approach. As the peti-

tioner in *Miranda* rightly stresses, the constitutional right to the assistance of counsel has grown with the years and the times.

In short, the Court can not resolve these issues by seeking the original intention of those who framed the Bill of Rights or by verbal exegesis of the "Assistance of Counsel" clause, and must therefore find the primary material for decision in its appreciation of contemporary standards and circumstances. The temporal flexibility of general constitutional standards was remarked by Mr. Justice McKenna as early as 1910 in *Weems* v. *United States*, 217 U. S. 349, 373:

> "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions."

Commenting on this passage nearly half a century later, Chief Justice Warren, in *Trop* v. *Dulles*, 356 U. S. 86 (1958), wrote (at 100-101):

> "The Court recognized in that [the *Weems*] case that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of maturing society."

These considerations apply to the Due Process Clause of the Fourteenth Amendment quite as much as to the Eighth Amendment[1] and their present import, we think, is both plain and of great moment. Since the Court is not here bound by history or verbal logic, the constitutional

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[1] At a later point in his opinion in the *Weems* case, Mr. Justice McKenna applied these generalizations directly to the Fourteenth Amendment (217 U. S. at 374).

standard may be applied with great flexibility, giving full weight to the bearing of contemporary empirical evidence of the need for and probable effect of the changes here sought.

These changes are not uniformly outlined, but in all these cases the defendants seek the establishment of a rule, to become effective at some point during pre-arraignment interrogation, at which the arrestee must either waive, obtain, or be provided with counsel, on pain of exclusion from evidence of any statement made in the absence of counsel. In No. 761 (*Westover*, Br. p. 34), petitioner would draw that line at the moment of custody; in No. 759 (*Miranda*, Br. p. 30), when interrogation begins; in No. 760 (*Vignera*, Br., pp. 10, 37-38) when the "accusatory" stage has been reached.

Under any of these proposals, it seems clear that the consequences would be:

(a) great reduction or virtual elimination of pre-arraignment interrogation of arrestees; or

(b) provision of counsel on a vast scale for arrestees, most of whom are indigent; or

(c) both (a) and (b) in varying degrees and unpredictable ratios.

We do not suggest that the statement of these consequences establishes them as undesirable. But we do suggest that they are of such a nature that further empirical investigation and analysis are necessary as a basis for general rule-making whether judicial or legislative. As was stated by Mr. Justice Black, dissenting in *Jackson* v. *Denno*, 378 U. S. 368 (1964) at 403 (commenting on the rule there adopted by the Court in line with the suggestions of commentators):

"None of these commentators appears to have gathered factual data to support his thesis, nor does it

appear that their arguments are at all rooted in the actual trial of criminal cases. Theoretical contemplation is a highly valuable means of moving toward improved techniques in many fields, but it cannot wholly displace the knowledge that comes from the hard facts of everyday experience."

D. Available empirical evidence is insufficient for projecting and evaluating the consequences of adopting the exclusionary rules proposed in these cases

The constitutional requirements of fair criminal procedure newly enunciated by this Court in recent years have had their origin by statute or judicial decision in the several states. This Court has, to be sure, given these rules general application by making them of constitutional dimension, but it has not originated the substance of the rules themselves. For example, at the time of *Mapp* v. *Ohio*, 367 U. S. 643 (1963), well over a third of the states had already adopted the exclusionary rule for evidence obtained by unlawful means, and the trend was heavily in that direction.[1] At the time of *Gideon* v. *Wainwright*, *supra*, all but thirteen states had statutes requiring that counsel be provided at trial for the defense of indigent defendants in all felony cases, and in eight of those juris-

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[1] The rule barring the use at trial of evidence obtained by unreasonable search and seizure was first introduced into American jurisprudence in the State of Iowa (*State* v. *Sheridan*, 96 N. W. 730 [Ia. 1903]), several years before the Court applied the rule to federal courts in *Weeks* v. *United States*, 232 U. S. 283 (1914). After *Weeks*, although Iowa abandoned the rule, eighteen states had voluntarily adopted it by 1949 (see appendix in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39). By 1960, with several states having adopted the rule subsequent to *Wolf*, the Court observed that "the movement towards exclusion has been halting but seemingly inexorable" (*Elkins* v. *United States*, 364 U. S. 206 at 219). In holding the rule applicable to the states in 1961, the Court referred directly to the experience of the states, particularly that of California (*Mapp* v. *Ohio*, 367 U. S. 643 at 650-653).

dictions counsel was in fact provided in felony cases.[1] At the time of *Griffin* v. *California*, 380 U. S. 609 (1965), all but six states barred comment upon a defendant's failure to testify at trial.[2]

In all these situations, accordingly, the probable consequences of the new constitutional rule were not a matter of speculation, for the rules were already in force on a non-constitutional basis in a large number of jurisdictions. This does not, of course, mean that debate over the merits of these rules had been stilled or that evaluation of their consequences was uniform. It was, however, clear prior to the constitutional decisions rendered in this Court that the substantive rules they embodied had already proved not only tolerable but preferable to their alternatives in many or most of the states, and the practical workings of the rules could thus be observed in the laboratories which the state and local systems furnished.

But such is not the case with the exclusionary rules proposed in the present cases. Only three states, to our knowledge, have adopted rules conditioning the admissibility of pre-arraignment statements on prior warnings to the defendant of his rights to remain silent and to consult counsel, and in these three states the rule is of very recent origin.[3] No state, so far as we know, has as yet established a system for the mandatory and universal provision of counsel for the indigent at the pre-arraignment stage.

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[1] See Brief for Petitioner in *Gideon* v. *Wainwright*, 372 U. S. 335, No. 155 Oct. Term 1962, p. 29; *cf.* Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME, p. 92 n. 262 (U. Va. Press 1965).

[2] See *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095 at 4098 (January 19, 1966).

[3] See *People* v. *Dorado*, 398 P. 2d 361 (Calif. 1965); *People* v. *Neely*, 398 P. 2d 482 (Oregon 1965); *State* v. *Dufour*, 206 A. 2d 82 (R. I. 1965). In addition, the Pennsylvania Supreme Court has stated (*Commonwealth* v. *Negri*, 213 A. 2d 670, 672 [1965])

(Footnote continued on following page)

Since in these cases, therefore, empirical evidence of the consequences of the proposed rules based on experience from their actual operation is altogether lacking, it would seem especially important to seek evidence from other sources. One would want to know, if only in part, the answer to questions such as the following:

(a) How important is pre-arraignment questioning in the identification and apprehension of those subsequently convicted of crime?

(b) How important are pre-arraignment statements as evidence for the conviction of those accused?

(c) What would be the effect on the interrogation process of (1) previous warning of the right to remain silent; (2) previous informing of the right to assistance of counsel; (3) a requirement that counsel either be waived or be present?

(d) How, in practice, would counsel be made available at the pre-arraignment stage?

This kind of empirical data can, in fact, be obtained, and would be of great value, particularly if studied in relation to available evidence on the effectiveness of alternative means of achieving the same goals. The techniques of the social sciences have already proven to be of considerable assistance in developing a body of usable knowledge in other areas of the law, and in stimulating invaluable reform in those areas. The statistical studies of the Man-

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(Footnote continued from preceding page)
that that state would follow the ruling of the Third Circuit Court of Appeals in *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (1965), where such a warning was held to be required, until further word from this Court. The State of Texas has long provided by statute (Tex. Code Cr. Proc. Art. 727), that a defendant's confession is excludable where he had not previously been warned of his right to remain silent; however, if the confession leads to confirming evidence both these "fruits" and the confession itself are admissible.

hattan Bail Project,[1] for example, have undoubtedly been greatly responsible for awakening the interest of both the bar and the public in thoroughgoing bail reform.[2]

But although empirical data bearing on the questions listed above may be obtainable, it has not as yet been obtained, at least in sufficient quantities to support a presumably enduring constitutional decision of nationwide application. We detail below several of the areas where both present facts and future prospects remain murky.

(1) *The importance of pre-arraignment questioning in law enforcement*

Police and prosecutorial authorities generally regard opportunity for sustained questioning of arrested suspects as essential for the maintenance of tolerable standards of efficiency in the apprehension and conviction of criminals. The validity of this view has been accepted and enunciated in various opinions and at various times by a number of the members of this Court, and on at least two occasions has commanded a majority. *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963); *Crooker* v. *California*, 357 U. S. 433 (1958) at 440-441, in which the opinion of the Court remarks that elimination of police questioning would have a "devastating effect on law enforcement." See also *Cicenia* v. *Lagay*, 357 U. S. 504 at 509 (1958).[3]

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[1] See Ares, Rankin and Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67 (1963); Wald, *Pretrial Detention and Ultimate Freedom*, 39 N.Y.U.L. Rev. 631 (1964); Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U.L. Rev. 641 (1964).

[2] See generally *Proceedings and Interim Report of the National Conference on Bail and Criminal Justice* (1965), esp. pp. xiii-xxxii (Interim Report, Apr. 1965) and pp. 6-17 (Address of Chief Justice Warren to the Opening Session of the Conference, May 27, 1964); *cf.* Paulsen, *Pre-Trial Release in the United States*, 66 Col. L. Rev. 109, 116-119, 122-125 (1966).

[3] There are other significant comments on the matter by members of this Court. See, *e.g.*, Mr. Justice Jackson's concurring opinion in *Watts* v. *Indiana*, 338 U. S. 49 (1949) at 58, and Mr. Justice Frankfurter's opinion in *Culombe* v. *Connecticut*, 367 U. S. 568 (1961) at 578-580, with citations to much of the voluminous literature on the question.

The authority of the decisions reached in the *Crooker* and *Cicenia* cases was questioned in *Escobedo* (378 U. S. 492), but not on the basis that the *Crooker* opinion's evaluation of police interrogation was unsound. Indeed, those members of the Court who dissented in the *Crooker* and *Cicenia* cases, and those who comprised the majority in the *Escobedo* case, have not based their conclusions on the premise that police interrogation of suspects is of little value in terms of law enforcement.

This favorable evaluation of police questioning has not gone unchallenged in recent months. Perhaps the most conservative recent estimate as to the value of confessions is that of Judge Nathan Sobel, who finds that confessions are used in less than 10 per cent of the criminal trials in Kings County, New York.[1] Judge Sobel's estimate has been sharply contradicted in several quarters, however, notably by New York County District Attorney Frank Hogan, who has noted that a recent study by his staff indicated that admissions had been made by 62 of 91 defendants in pending homicide cases.[2] Mr. Hogan added that "assistant prosecutors told him that 25 of these, or 27%, could not have been indicted at all if there were no confessions."[3]

Without venturing to pass judgment as between any of these estimates, we suggest that the extent to which confessions are used in evidence is not the only value of police interrogation. Often the questioning furnishes leads to other evidence, and no doubt there are many pre-arraignment admissions and confessions which are not offered at

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[1] N. Y. Law Journal, Nov. 15, 1965, p. 1, col. 6, p. 4, col. 5. Judge Sobel's statistics are based on a survey of the first 1,000 indictments filed in Kings County, New York, subsequent to January 7, 1965. As he acknowledges (*id.* p. 4, col. 5), this is a small sampling; it also gives no hint of the extent to which police questioning may have led to other evidence, or to the immediate release of a suspect.

[2] *N. Y. Herald Tribune*, Dec 2, 1965, p. 31.

[3] *Id.*

the trial because checking their contents led to sufficient independent proof.

Other available statistics indicate that confessions or admissions are made, and used, in quite a high percentage of cases. See, *e.g., Supplementary Memorandum on Behalf of Respondents* in *Linkletter* v. *Walker* and *Angelet* v. *Fay*, Nos. 95 and 581, respectively, Oct. Term 1964 (statistical tables pp. 8-14, summarizing a study of the trial records of the last 100 persons executed for murder in New York prior to 1961, indicate that statements made to the police, after arrest, were introduced in the trials of 85 of those defendants); Barrett, *Police Practices and the Law—From Arrest to Release or Charge*, 50 Calif. L. Rev. 11, 35-44 (1962) (three month study of police performances in two California cities in 1960 showed that between 75 and 90% of all persons charged with crimes had given confessions after what the author terms "surprisingly short" periods of interrogation). The *amicus* brief of the National District Attorneys Association in the present cases presents similar statistics.

Another function of police questioning—perhaps even more important to the effective day to day administration of justice than the solution of a few major crimes—is that of screening cases where an arrest may well have been made upon probable cause but where a decision to charge cannot or should not be made without some further investigation by the police and some evaluation by the prosecutor of the circumstances of the arrest and the availability of admissible evidence. See Bator and Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 Col. L. Rev. 62, 68-70 (1966); LaFave, ARREST, 319-341 (1965). As Professors Bator and Vorenberg have pointed out, the problem of police questioning must be considered in the context of a going system of law enforcement. Bator and Vorenberg, *supra*, at 69. In any large metropolitan area, a great number of persons will be lawfully arrested for a wide

variety of reasons; routine preliminary questioning may well result in their release prior to the filing of any charge, or in the filing of less serious charges. *Id.*, at 69-70, see also Barrett, *supra*, at 31-35.

The California surveys which are the subject of Dean Barrett's study are particularly illuminating in this regard. They indicate that 28.5% of the persons arrested and booked for felonies in California in 1960 were released without the filing of a complaint; in an additional 21.6% of the cases the felony arrests eventually resulted in the filing of misdemeanor complaints. Barrett, *supra*, at 31-35. To the extent that such preliminary screening can be accomplished without subjecting the individual to coercive interrogation—and the available evidence indicates that coercive interrogation is not at all typical of police questioning[1]—it is obviously desirable both in terms of administrative efficiency and in terms of avoiding the unnecessary stigmatization of a person as one who has been charged with crime.

We recognize, of course, that the utility of police interrogation in law enforcement is not the only factor bearing on the issues presented by these cases. But if competing values must be considered, then it is necessary to have as accurate a gauge of their weight as is possible.

On that score, it must be recognized that our present knowledge is far from complete, as the conflicting estimates cited above amply demonstrate. Nevertheless, it is clear

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[1] See, *e.g.*, LaFave, *supra*, at 386, where the author observes that

> "In the great majority of in-custody interrogations observed [in the states of Michigan, Wisconsin and Kansas, in 1956 and 1957], the possibility of coercion appeared slight. In many instances the suspect is merely confronted with the evidence against him or with evidence inconsistent with his prior statements and is asked to give an explanation. Often he is just given an opportunity to admit to other outstanding offenses recited to him. Lengthy, continuous questioning is the exception rather than the rule. In practice the interrogating detective often terminates the questioning after a brief period to appear in court or to check upon statements already given by the suspect."

that there is a widespread belief among judges, prosecutors, and police officials that interrogation is of *great* importance to law enforcement. Until the contrary appears, therefore, this Court should adhere to the view, expressed in Mr. Justice Goldberg's opinion in *Haynes* v. *Washington, supra,* that (373 U. S. at 515): "Such questioning is undoubtedly an essential tool in law enforcement."

(2) *Effect of the presence of counsel on pre-arraignment interrogation*

Assuming (as one must in the present state of knowledge) that police questioning is an essential part of law enforcement, the next question generated by these cases goes to the effect on the interrogation process of the warning admonitions with respect to constitutional rights and, more important, of the actual presence of counsel during the course of interrogation.

Lack of knowledge on this point is openly acknowledged in the petitioner's brief in No. 759 (*Miranda*) wherein it is stated (Br. p. 45) that: "As a practical matter, we cannot know with assurance whether amplification of the right to counsel in the interrogation period will severely handicap the police; we end by trading opinions." We earnestly suggest that some knowledge of this matter is vital for enlightened decision-making, particularly of constitutional dimension.

Members of this Court have addressed themselves to this point on several occasions. In *Cicenia* v. *Lagay, supra,* Mr. Justice Harlan, speaking for a majority of the Court, expressed the view (357 U. S. at 509) that consultation with counsel in the course of pre-arraignment interrogation "would constrict state police activities in a manner that in many instances might impair their ability to solve difficult cases." Mr. Justice Frankfurter, writing in the *Culombe* case, *supra,* was more categorical (367 U. S. at 580): "Legal counsel for the suspect will generally prove

a thorough obstruction to the investigation." No doubt many lawyers would readily accept Mr. Justice Jackson's analysis of the consequences in his concurring opinion in *Watts* v. *Indiana, supra,* 338 U. S. at 59:

> "To bring in a lawyer means a real peril to solution of the crime because, under our adversary system, he deems that his sole duty is to protect his client—guilty or innocent—and that in such a capacity he owes no duty whatever to help society solve its crime problem. Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

To be sure, as Mr. Justice Goldberg pointed out in the *Escoboedo* case (378 U. S. at 488), this point "cuts two ways", inasmuch as it highlights the suspect's need of counsel at the same time that it emphasizes the importance to the police of an atmosphere conducive to communication. Analysis of the conflicting considerations implicit in this comparison takes us beyond the empirical problem. Once again, we do not suggest that police efficiency is the only goal of criminal procedure. But in resolving these issues, precision in weighing the individual factors is desirable.

It may be that consultation with counsel would prove to be less of an obstacle to police interrogation than has been generally assumed. But for such a possibility there is at present no significant empirical evidence, and this lack carries its own warning of caution in the enunciation of new constitutional requirements.

A further problem, closely related to the one directly in view, is that the response of the bar to a general requirement of counsel in the pre-arraignment stages cannot be accurately forecast. We agree with the petitioner in No. 759 (*Miranda,* Br. pp. 38-39) that the cost factor should not be determinative, but we think he is quite wrong in regarding the problem as primarily one of cost.

Legal services are, after all, professional services, and shortages of qualified professional services cannot be immediately rectified with money. There is a serious shortage of doctors in this country, quite beyond the reach of prompt cure by the appropriation of public funds.

If, as the petitioner in No. 761 (*Westover,* Br. p. 34) suggests, all jails should be equipped with public defenders, then one must ask who they will be and what will they do. One must ask the same questions if it is anticipated that private lawyers will be subsidized for these purposes.

Assuming that the privilege against self-incrimination is the principal legal element in the interrogation problem, virtually the only function of station-house counsel will be to paste adhesive tape over his new clients' mouths. It is at best dubious whether such a practice would attract the cream of the bar.

Possibly some sort of special training would be necessary to qualify members of the bar for these new pursuits. At all events, it is plain that at present the bar is not equipped, either conceptually or numerically, to cope with the demands which would follow in the wake of the rules proposed by some of the petitioners in these cases.

E. Variety and imprecision of proposals to extend the right to counsel to pre-arraignment interrogation

"There is a tide in the affairs of men," declares the petitioner in No. 759 (*Miranda,* Br. p. 34), "and it is this engulfing tide which is washing away the secret interrogation of the unprotected accused." We think that whatever "it" is might better be described as a tide-rip, in the churning waters of which various and mutually conflicting proposals are being banged against each other. This conflict is most apparent with respect to the proposed point in time at which the right to the assistance of counsel attaches, and to the consequences which are anticipated to flow from recognition of the right.

None of the defendants in the present case proposes that the right should attach prior to taking the accused into custody at the police station, but beyond that point there is little or no agreement. In No. 761 (*Westover,* Br. p. 34), for example, petitioner apparently suggests that the right attaches as soon as the suspect is in custody, though there is also a suggestion that this is not the case until there is "interrogation directed toward eliciting a confession." In the view of counsel for Westover, the consequence will be that a lawyer will be present and available at all jails to represent the interrogated suspects.

The petitioner in No. 759 (*Miranda*) does not advert to this precise question, but his major contention is (Br. p. 11) that "There is a right to counsel for arrested persons when interrogated by the police", and from this it may be inferred that the right accrues when interrogation commences. Apparently it is also his view (Br. pp. 39-49) that interrogation will continue, and that counsel will always be present.

In No. 760 (*Vignera*), the petitioner has attempted to achieve greater precision, utilizing language drawn from the *Escobedo* case, 378 U. S. at 492, and states his test as follows (Br. p. 38):

> "In practice, it would operate as follows: When the proceeding has become accusatory, the police or prosecutor will be obliged to warn the accused of his absolute constitutional right to silence and of his right to consult with counsel *before* talking any further with the police. If the accused thereupon intelligently and effectively waives his right to silence and his right to immediate consultation with counsel, the interrogation can continue. If the accused wishes to consult with previously retained counsel, he will be permitted to do so and the interrogation will not continue while the police are awaiting the lawyer's arrival. If the accused does not already have counsel and is indigent, the

police may adopt one of two procedures. They may suggest the local public defender or Legal Aid Society and provide access to telephone communication. On the other hand, if the police are unwilling or unable to recommend such counsel, they will simply terminate the interrogation at that point."

Petitioner in *Vignera* does not share the taste of Westover for jails equipped with lawyers; the "automatic assignment of counsel at the station house", he declares (Br. p. 40), would be "an impractical solution and one which the police are ill-equipped to achieve". From this and other passages in the brief, it seems clear that counsel for Vignera is prepared to reckon with frequent terminations of interrogations when the "accusatory" point is reached.

Inasmuch as in the *Escobedo* case an Assistant State's Attorney was called to help frame and to record the confession (378 U. S. at 483), the Court was warranted in describing the process as "accusatory" rather then "investigatory." Yet it seems to us far from clear that the "accusatory-investigatory" comparison in *Escobedo* was intended as a test of general application in future cases, rather than merely as a description of the circumstances in the case at hand. The usefulness of the "accusatory" test has been recently questioned by the Court of Appeals for the Second Circuit, sitting *en banc*, in *United States* v. *Cone*, ——F. 2d —— (Nov. 22, 1965, slip opinion pp. 3391, at 3398-99):

"It has been suggested that the process of questioning suspects may be dissected into 'investigatory' and 'accusatory' phases and that certain legal conclusions, such as whether the Sixth Amendment's right to counsel 'attaches' and requires that the suspect be advised of his rights to silence and counsel, should flow from a judicial finding that police questioning has passed beyond mere investigation. We do not consider this a realistic doctrine for most cases. It was not the job

of the agents questioning Cone, nor were they qualified to make nice decisions about the sufficiency of the evidence they possessed; nor could they at the time of arrest determine what charges should be formally made and against whom. Agents in hot pursuit of those whom they have reason to believe may be implicated in a crime which has just been discovered cannot be required 'on the spot' to decide difficult questions of the sufficiency and quantum of proof.

We think a judicial inquiry into whether the agents were still in the 'investigatory' stage when they arrested Cone, and whether what had started out as an investigation had reached the 'accusatory' stage when Cone was questioned immediately after his arrest, would serve no useful purpose. What may seem to be sufficient evidence at one stage of an investigation may become quite insufficient when those who have supplied information are themselves accused and become unavailable to the government as witnesses, as happened with Moser and Spencer in this very case. To make judicial assessment of the questioning process turn on whether questioning occurred when a case was no longer in the 'investigatory' stage and had entered the 'accusatory' stage would force police officers to make momentary and critical decisions so unrelated to the actualities of law enforcement that the entire police function might well be significantly undermined or demoralized."

It is true that in several recent decisions the "accusatory-investigatory" language of *Escobedo* has been used as a test.[1] Nevertheless, we share the doubts expressed in the Second Circuit. A typical police investigation may involve

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[1] *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3d Cir. 1965); *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965); *State* v. *Neely*, 239 Ore. 487, 398 P. 2d 482 (1965); *cf. State* v. *Dufour*, 206 A. 2d 87 (R. I. 1965).

the employment of a large number of detectives simultaneously searching for evidence, pursuing different leads, interviewing witnesses and suspects or possible suspects, and checking out alibis. The discovery of a single piece of evidence might focus suspicion on a single individual at any given point in time, yet not justify regarding him as an accused, particularly where there may not be enough evidence even to justify holding him in custody. Even where the case is a routine one, a determination of when an investigation has reached the accusatorial stage involves judgments which cannot easily be made even by courts acting after the fact, much less by a police officer who may be acting in extremely pressing circumstances.

In *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (3rd Cir. 1965), the Court of Appeals for the Third Circuit, in ruling that the interrogation there involved had reached the "accusatory" stage, gave weight (351 F. 2d at 437) to the volume of independent evidence implicating Russo at the time he confessed. Petitioner in *Vignera* (Br. p. 16) endorses this as one of the indicia of the "accusatory" stage.

We find the implications of this troublesome, for it leads to the consequence that good detective work and the accumulation of independent evidence will operate to shorten rather than lengthen the permissible period of "investigatory" interrogation. Ordinarily the police utilize interrogation to confront a suspect with evidence of his implication in the crime, both to see whether he can offer credible exculpatory explanation, and to stimulate admissions if no such explanation can be given. But under the "accusatory" test as applied in the *Russo* case, the police face the prospect that the greater the reason for interrogation of the suspect, the less will be their right to do so, unless counsel is brought into the picture.

We have considered the several proposals and the tests not so much to study their intrinsic merits and demerits,

as to demonstrate their variety and imprecision, and indicate the numerous questions they suggest but do not resolve. These matters are, we believe, highly relevant to the constitutional dimension of these cases, for they argue strongly against "freezing" the pre-arraignment scope of the right to counsel at a time when analysis of the problem is still in its infancy.

F. Importance of non-constitutional decisional sources

In this brief, we have urged that the scope of the right to the assistance of counsel prior to arraignment presents problems which are not ripe for constitutional disposition. In support of this viewpoint, we have sought to draw the Court's attention to a number of aspects of the problem, where, we believe, empirical evidence is insufficient for definitive rule-making, and to the uncertainties still surrounding the specific proposals that have been made to extend the right to counsel into the prearraignment stage.

We would like to close this portion of the brief on an affirmative note, by pointing out that the Constitution is by no means the only tool for the solution of problems of criminal procedure and that legislatures, state courts and professional organizations are currently concerned and actively engaged with pre-arraignment questions including the right to counsel. Nor is the field devoid of ideas and proposals alternative to those urged by petitioners in the present cases.

Public and professional concern with police interrogation centers chiefly on the possibility of abusive, oppressive practices, both physical or psychological, that subject the arrestee to pressures which violate the policy if not the letter of the Fifth Amendment privilege against self-incrimination. Furnishing counsel is one but only one of many means of ensuring that the suspect has an opportu-

nity to make a responsible choice as to whether or not to incriminate himself. There are a wide variety of alternative means by which this goal might be met, including rules barring the use of any confession made to the police; or made to the police during a delay in bringing a suspect before a magistrate; or made by a suspect who has not been warned of his right to remain silent; or made after the suspect has been denied a requested opportunity to consult family or friends or a lawyer; or shown by an evaluation of the "totality of the circumstances" to have been physically or psychologically coerced.

These rules obviously could be employed in combination. Indeed, it appears that the draftsmen of the American Law Institute's proposed Model Code of Criminal Procedure have contemplated an exclusionary rule based on a combination of requirements, including precise time limitations on the length of custody for pre-arraignment questioning; a requirement that a suspect be informed that he is under no obligation to talk; proscriptions against incommunicado detention and against other potentially coercive practices; and a prohibition of any questioning in the absence of counsel once detention has extended beyond a specified period of a few hours, except where there has been an explicit consent to such questioning. See Bator and Vorenberg, *supra*, at 71-76.

We do not suggest that any one of these alternatives is necessarily preferable to the others, or would protect the individual's privilege against compulsory self-incrimination better than would a rule requiring the state to furnish counsel at the stationhouse. We do suggest that the states should have an adequate opportunity to develop alternative methods. It may well be that experience will show that the alternatives provide adequate protection against police coercion, while having a significantly less damaging effect on the detection and prevention of crime.

The complex problems in the area of pre-arraignment procedure[1] are particularly appropriate for solution by legislation rather than by judicial decision. As Judge Kaufman stated in *United States* v. *Drummond*, —— F. 2d —— (2d Cir., Dec. 2, 1965, slip opinion pp. 3425, 3444):

> "... our Constitution guarantees fundamental rights, not the utterance of some judicially-ordained shibboleth. A decision based on constitutional fiat, therefore, is not a desirable method for reaching an informed resolution of the pre-trial access to counsel problem. This is precisely the sort of question that can best be answered after the investigative, experimental, and interest-balancing methods of the legislature are utilized."

A legislature is not limited by the facts of a particular case, and can deal constructively with the problems of police questioning in the context of the broad range of problems which exist in the pre-arraignment area. Questions of permissible police conduct during questioning of a suspect obviously bear a close relationship to standards for initial stopping, arrest, search, and subsequent detention. A legislature, working within a broader framework, can adjust the interrelated portions of the process without rejecting the ultimate goals sought by the proponents of an exclusionary rule based on the right to counsel. In addition, a legislature can be more specific than a court; the precise language of a statute may provide for more effective guidance than a judicially created rule formulated on the facts of particular cases.

Large-scale scholarly efforts—most significantly the American Bar Association's project on minimum stand-

[1] Judge Friendly, remarking upon the complexity of this subject, has noted that the ALI's partial preliminary draft on pre-arraignment procedure spreads over fifty pages. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 930 (1965).

ards of criminal justice and the drafting of a Model Code of Pre-Arraignment Procedure by the American Law Institute—are underway, and may be expected to provide a basis for constructive action by state legislatures and courts. Even if the states did not all promptly adopt new statutory rules in light of the ALI Model Code, the Code —and its offshoots in the states that used it as a model— would provide valuable guidelines for courts faced with recurring problems in this area. See Friendly, *loc. cit. supra*, at 929.

We do not think the Court need be concerned that the state courts will rest content with old precedents, or ignore the demands of changing times and standards. As we have already noted, in other areas of criminal procedure the Court's new constitutional pronouncements followed state court decisions which, in fact, formed an important part of the basis for this Court's decisions.

The same progressive tendency is manifest among the state courts that have dealt extensively with problems pertaining to the right to counsel. For example, this Court's two most controversial recent decisions—i.e., the *Massiah* and *Escobedo* cases—had previously been anticipated in closely comparable decisions in New York State. In *People* v. *Di Biasi*, 7 N. Y. 2d 544 (1960), the New York Court of Appeals reversed a conviction because, as in the *Massiah* case (1964), the defendant made a statement (received in evidence at his trial) after indictment and in the absence of counsel.[1] In *People* v. *Donovan*, 13 N. Y. 2d 148 (1963), the court reached the same result where, as in *Escobedo* (1964), the defendant, prior to arraignment, had been denied access to his retained counsel.[2]

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[1] In *People* v. *Meyer*, 11 N. Y. 2d 162 (1962), the same rule was applied to a statement made after arraignment but before indictment.

[2] The *Donovan* case was cited with approval in the *Escobedo* case, 378 U. S. at 486-87.

Very recently, in *People* v. *Gunner*, 15 N. Y. 2d 226 (1965), the court extended pre-arraignment rights to counsel considerably beyond the holding of the *Escobedo* case. In the *Gunner* case, the defendant had made pre-arraignment statements to the police both before and after a lawyer had informed the police that he represented Gunner and wished that no more statements be taken. The conviction was reversed because the statements made after the lawyer's request were received at the trial; two members of the Court would have ruled the earlier statements likewise excludable, because the defendant had not been warned of his rights. See also *People* v. *Friedlander*, 16 N. Y. 2d 48 (1965).

If some other states have not yet had occasion to pursue the questions, or have reaffirmed more limited concepts of the right to counsel, that is still an insufficient reason for this Court to enlarge the constitutional requirements. The opportunity for constructive and varied development is one of the great values of the federal system. To let pass an opportunity such as presently exists for the development by the states of workable rules in this area of strong conflicting values would do great disservice to the principles of federalism and, we suggest, to the healthy development of criminal procedure in the United States.

II

New exclusionary rules limiting the admissibility of pre-arraignment statements should not be applied retroactively.

No. 762, *Johnson and Cassidy* v. *New Jersey*, is a proceeding for post-conviction relief in which petitioners contend that their pre-arraignment incriminatory statements, received in evidence against them at trial, were constitutionally inadmissible under the principles subsequently enunciated in the *Escobedo* case. The Supreme Court of New Jersey affirmed the denial of their applica-

tion, ruling that the *Escobedo* case established new rules of constitutional due process which should not be applied retroactively.[1]

In their brief (at pp. 32-34) in No. 762, the petitioners reject the conclusion below that *Escobedo* established new rules of constitutional law, and contend that the case therefore involves no problem of retroactivity. As *amici curiae*, we express no opinion on that question. Assuming, however, that this Court should agree with the New Jersey court's analysis of *Escobedo*, the problem of retroactivity must then be faced, as it also must in the event new exclusionary rules are to be established in the present or subsequent cases.

The Court has made it clear in two recent cases that not all new constitutional rules must be applied retroactively; rather the merits and demerits of retrospectivity must be weighed with respect to each case, by looking to the nature, purpose, and effect of the new rule, the reliance placed upon the previously existing rule, and the effect upon the administration of justice of a retroactive application of the new rule. *Linkletter* v. *Walker*, 381 U. S. 618, 628-29, 636 (1965); *Tehan* v. *Shott*, —— U. S. ——, 34 U.S.L. Week 4095, 4096 (Jan. 19, 1966). We submit that an examination of these considerations in the context of an exclusionary rule limiting the admissibility of pre-trial statements makes it amply clear that no such rule should be applied retroactively so as to vitiate a final conviction.

A. The state judicial systems and state law enforcement officials have justifiably placed great reliance on past decisions of this Court establishing voluntariness as the sole criterion for admissibility of a pre-arraignment statement.

There can be no doubt that over the course of years there has been extensive and justifiable reliance by the

[1] Other issues, unrelated to those discussed in this brief, are also raised by petitioners in No. 762.

state judicial systems upon this Court's decisions establishing voluntariness as the criterion for determining the admissibility of a pre-trial statement of an accused. Indeed, the Court had specifically held that the introduction of incriminating statements obtained in the absence of counsel—even after the defendant had clearly become the focus of a police investigation and had requested counsel—was no constitutional bar to a valid judgment where the statements were not involuntary. *Crooker* v. *California*, 357 U. S. 443 (1958); see also *Cicenia* v. *Lagay*, 357 U. S. 504 (1957); *Culombe* v. *Connecticut*, 367 U. S. 568, 588-602 (1961); *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951).

As recently as 1963, the Court reiterated the well established rule that the admissibility of a pre-trial statement depended on its voluntariness, in a case where it held simply that the absence of a warning of a right to silence, delay in arraignment, and lack of opportunity to consult with counsel were factors involved in an assessment of voluntariness. *Haynes* v. *Washington*, 373 U. S. 503, 510-511 (1963). For this Court now to apply a new exclusionary rule retroactively, without regard to the voluntariness of challenged statements, would be to hold that the state courts should not have admitted evidence which this Court had plainly told them was admissible. *Cf. Linkletter* v. *Walker*, *supra* at 637; *Tehan* v. *Shott*, *supra* at 4096-4098.

The reliance of the police and prosecutors is also significant. A District Attorney naturally prepares his case on the basis of what this Court tells him is the applicable law. At least prior to the decision in *Escobedo*, the only federal constitutional bar to the admissibility of a defendant's pre-arraignment statement was involuntariness—if his statement was voluntary, it was admissible. The police, too, must have relied upon the many decisions holding that the relevant criterion was voluntariness. Certainly they

cannot be said to have been on any kind of notice that they were under any obligation to inform a suspect of a "right" to consult with counsel to be provided by the state. In this respect, the case for non-retroactive application of any new rule governing the admissibility of pre-arraignment statements is far stronger than in the *Linkletter* situation; at least during the period following *Wolf* v. *Colorado*,[1] the police knew (or should have known) they were violating the defendant's constitutional rights when they made the searches later complained of.

Surely it cannot be said that the reliance of the state courts, the prosecutors, and the police upon the past decisions of this Court was wholly misplaced. Yet that would be precisely the effect of a holding that a new exclusionary rule—whether based on a requirement of a warning of a right to silence, or of prompt arraignment, or of informing an accused of a right to consult with counsel, or of any variant thereof—must be applied retroactively.

B. The purposes of a new exclusionary rule would not be served by retroactive application

(1) *Deterrence*

The primary purpose of any exclusionary rule limiting the admissibility of pre-arraignment statements would surely be to deter the police from using coercive methods of interrogation which would violate the policy of the privilege against self-incrimination. *Cf. Escobedo* v. *Illinois*, 378 U. S. 478, 487-90; *Crooker* v. *California*, 357 U. S. 433, 441 (1958); (Douglas, J., dissenting); *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P. 2d 361, 367-369 (1965).

Clearly however, as this Court recognized in the *Linkletter* case, *supra*, at 636-637, the deterrent purpose of an exclusionary rule cannot be served by its application to past trials. It is self-evident that past conduct cannot be deterred; that "ruptured privacy . . . cannot be re-

[1] 338 U. S. 25 (1949).

stored". *Linkletter, supra,* at 637; *Tehan, supra,* at 4098. To the extent that an exclusionary rule serves as an effective deterrent to a particular kind of police conduct it is because the police, after the establishment of such a rule may be expected to act appropriately with knowledge of its sanctions.

(2) *Protection of the innocent*

The Court observed in *Tehan* that—notwithstanding passages in the majority opinion in *Griffin* v. *California* which would indicate the contrary[1]—the rule established by the *Griffin* case did not relate primarily to protecting the innocent against conviction. *Tehan* v. *Shott, supra* at 4098. A new exclusionary rule governing the admissibility of a defendant's statements would in this respect have even less claim to retroactive application than would the rule barring comment.

The danger of convicting the innocent on the basis of his own statements lies in the possibility that physical or psychological coercion might have produced an unreliable statement. To the extent that this is a real possibility, however, retroactive application of a new exclusionary rule is unnecessary. The involuntariness of a defendant's statement has long been grounds for exclusion at trial and for reversal on appeal (see *Brown* v. *Mississippi*, 297 U. S. 278 [1936]; *cf. Bram* v. *United States*, 168 U. S. 532 [1897] and authorities cited therein), and at least where the sate's procedure for testing voluntariness has been found unreliable (see *Jackson* v. *Denno*, 378 U. S. 368 [1964]), post-conviction relief is generally available in the state courts (see *e.g., People* v. *Huntley*, 15 N. Y. 2d 72 [1965]). Moreover, federal habeas corpus is available for a claim of involuntariness; thus, insofar as a delay in arraignment, or the lack of a warning as to a right to silence or to consult a lawyer, may have contributed to the making of an in-

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[1] See *Griffin* v. *California*, 380 U. S. 609 at 613 (1965).

voluntary statement, relief is available. See, *e.g.*, *Reck* v. *Pate*, 367 U. S. 443 (1961); *Fay* v. *Noia*, 372 U. S. 391 (1963); *cf.* Brief for Petitioners in *Johnson and Cassidy* v. *New Jersey* (No. 762) pp. 32-34.[1]

(3) *The integrity of the judicial system*

In the *Tehan* decision, the Court emphasized that the complex of values which go into the privilege against self-incrimination relate primarily to preservation of a judicial system in which the guilty are not to be convicted unless the prosecution "shoulder the entire load". *Tehan*, *supra*, at 4098. The Court's finding in *Tehan* that the rule of *Griffin* v. *California*—aimed at protecting the privilege against self-incrimination—should not be held retroactive is obviously relevant in the context of the exclusionary rules now urged upon the Court, all of which also relate primarily to protection of that privilege.

Rather than being in any way furthered by retroactive application, the integrity of the judicial system—in the sense that the system symbolizes a steady and reliable institution—would be seriously undermined by retroactive application of a new exclusionary rule, since a holding of

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[1] Of course, while federal habeas corpus may always be available for a claim that a statement was based on physical or psychological coercion, the states must be recognized to have a strong interest in limiting the availability of collateral attack in their courts to cases in which, *for good cause*, a constitutional claim was not previously raised. The New Jersey Supreme Court, after noting that petitioners' present allegations with respect to denial of an opportunity to consult counsel and failure to advise of the right to remain silent had not been raised in any prior proceedings—despite antecedent New Jersey decisions holding that these factors are relevant to the issue of voluntariness—held that its prior adjudication of the voluntariness question precluded further consideration of that issue. *State* v. *Johnson*, 206 A. 2d 737 at 740. The Court did not inquire into whether there were exceptional circumstances which would justify the failure to raise these issues earlier in the context of the voluntariness issue—perhaps because the petitions for post-conviction relief did not allege any excuse for this failure. *Cf. Fay* v. *Noia*, 372 U. S. 391 (1963).

retroactivity would necessarily draw into question the value of this Court's decisions as a guide for future conduct. To hold that the reliance of the state courts and state law enforcement officers upon the past decisions of this Court was wholly misplaced would cast doubt upon the precedental value of any new decision in the criminal law field. Predictability is certainly an important value in this area of the law (*cf. Pointer* v. *Texas,* 380 U. S. 700, 411, 413 [Goldberg, J., concurring]), yet that value would be completely rejected by retroactive application of a new rule in this area. Furthermore, the confidence of the public in its legal system surely would not be enhanced by the wholesale release from prison of persons whose guilt of serious crimes is not questioned, on the basis of retroactive application of a new rule which does not relate to the reliability of the conviction.

C. Retroactive application of a new exclusionary rule would place overwhelming burdens on the administration of justice by the states

The opinions of this Court in the *Linkletter* and *Tehan* cases placed heavy emphasis on the fact that retroactive application of the rules at issue in those cases would place great stresses on the administration of justice. The retroactive application of a new exclusionary rule affecting the admissibility of pre-trial statements would, however, place even more severe burdens upon the administration of justice.

(1) A great number of cases would have to be reopened, and a large number of persons—particularly those under long sentences, for serious crimes—would inevitably be released from custody

There can be little doubt but that retroactive application of a new exclusionary rule affecting the use of a defendant's pre-trial statements would result in the reopening of more convictions than would a retroactive application

of the *Mapp* exclusionary rule. What is perhaps even more significant is the fact that such statements, or their fruits, are most apt to have been used in prosecutions for violent, frequently unwitnessed crimes, such as murder, manslaughter, rape, kidnapping and robbery. The individuals convicted of these crimes are the ones who would be most likely to reap the benefits of retroactive application of a new rule in this area.[1]

The pre-trial statements of the defendants were introduced at the trials of 85 of the last 100 persons executed in New York State prior to 1962.[2] It is certainly reasonable to suppose that a similarly high percentage of incriminatory statements was introduced at other trials for serious crimes. Few indeed are the cases in which such statements were made in the presence of counsel or after consultation with counsel. The persons who had been convicted at trials at which such statements were used would, by hypothesis, receive the benefit of retroactive application regardless of the fact that they were convicted fairly under the law as it stood at the time of the trial, despite the reliability of the adjudication of guilt, and irrespective of the voluntariness of their statements.

Application of any new exclusionary rule to convictions which became final prior to the change in the law would, of course, afford significant advantages to the convicted

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[1] Some idea of the impact upon old convictions of these serious crimes may be gained from the statistics presented to this Court last year by the New York Attorney General and the National District Attorneys Association in connection with the cases involving the retroactivity of the *Mapp* exclusionary rule. See text at p. 25, *supra*. As of June 30, 1964, some 13,869 persons were imprisoned in New York for felony convictions; of these, 4,543 were imprisoned pursuant to convictions had prior to January 1, 1961. Over 50% of those imprisoned for over 3½ years—2,607 of the total, of 4,543—had been convicted of murder, manslaughter, kidnapping, rape or robbery. See Supplementary Memorandum on Behalf of Respondents in *Linkletter* v. *Walker* (No. 95, Oct. Term 1965) and *Angelet* v. *Fay* (No. 578, Oct. Term 1965) at page 4.

[2] Supplementary Memorandum (*supra*, n. 1) at pp. 8-14.

individual who sought to take advantage of the new rule via an application for post-conviction relief. Both on collateral attack and, if that succeeded, upon retrial of the case, the passage of time—with the consequent dimming of memories, death or departure of witnesses, and loss of relevant records—would inevitably work to the accused's advantage. See, *e.g., Tehan* v. *Shott, supra* at 4099; *Linkletter* v. *Walker, supra* at 637-638; *United States ex rel. Angelet* v. *Fay,* 381 U. S. 65 (1965); *United States* v. *Sobell,* 314 F. 2d 314, 325 (2d Cir.), cert. denied 374 U. S. 857 (1963); Bator, *Finality in the Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 478 (1963). As Judge *Friendly* observed in writing for a unanimous Court in the *Sobell* case, *supra* at 325:

> "collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend that he is entitled to that relief from the courts."

(2) *Retroactive application of a new rule would impair the future development of progressive solutions to the difficult problems of criminal procedure*

The recent decisions of this Court with respect to the admissibility of pre-trial statements made in the absence of counsel have been founded substantially on the prior development of similar rules by the state courts, particularly the New York Court of Appeals. See *Massiah* v. *United States,* 377 U. S. 201 at 204-205 (1964) and *Escobedo* v. *Illinois,* 378 U. S. 478 at 486-487 (1964).[1]

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[1] The *Massiah* decision noted some 10 New York decisions, most notably *People* v. *Waterman,* 9 N. Y. 2d 561 (1961); *People* v.

(Footnote continued on following page)

It seems certain, however, that one reason why the state courts have exercised their powers broadly in establishing new exclusionary rules is because of their expectation that the newly enunciated rules would affect relatively few past cases—indeed, only those in which the direct appellate process had not yet been exhausted. The New York Court of Appeals, for example, has declined to apply its new rules retroactively.[1] See *People* v. *Howard*, 12 N. Y. 2d 65 (1962), *cert. denied* 374 U. S. 840 (1963); *People* v. *Dash*, 16 N. Y. 2d 493 (1965). Similarly, the California Supreme Court, one of the few state courts which has interpreted the *Escobedo* decision as requiring a warning of a right to consult counsel and to have counsel provided, even in the absence of a request, has declined to apply its new rule retroactively. Compare *People* v. *Dorado*, 42 Cal. Reptr. 169, 398 P. 2d 361 (1965) with *In re Lopez*, 42 Cal. Reptr. 188, 398 P. 2d 380 (1965).

Significantly, the progressive New York rules were all developed in cases where appropriate and timely objections were made at trial to the use of the statement in question. If collateral attack were to be made broadly

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(Footnote continued from preceding page)

Rodriguez, 11 N. Y. 2d 279 (1962); *People* v. *Meyer*, 11 N. Y. 2d 162 (1962); and *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). The *Escobedo* opinion relied on *People* v. *Donovan*, 13 N. Y. 2d 148 (1963). This Court has also relied heavily on state court decisions in developing the exclusionary rule barring the use at trial of illegally seized evidence. See *Mapp* v. *Ohio*, 367 U. S. 643 at 651-653 (1963).

[1] Significantly, New York has long allowed post-conviction relief for a claim that a conviction was obtained in the absence of counsel. See, *e.g.*, *Matter of Bojinoff* v. *People*, 299 N. Y. 145 (1949). The New York courts thus recognize the great distinction which exists between the case where a defendant has been deprived of the assistance of counsel at trial and the case where a defendant who has had the assistance of counsel at trial later seeks to take advantage of a change in the rules governing the admissibility of evidence. Even though the change may have enlarged the right to counsel at a pre-trial stage, the New York courts will not permit collateral attack in the latter case.

available for claims based on a new exclusionary rule in the confession area, it is to be expected that concepts of trial strategy would be adjusted accordingly. Surely the incentive of defense counsel to challenge an existing rule of law in a developing area would be lessened—a different course could be pursued at trial and, as in the *Johnson* case now before the Court (No. 762), a constitutional challenge could later be made on collateral attack.

Both the lessened likelihood of challenge to existing rules and the spectre of further retroactive effects could be expected to inhibit state appellate courts—and perhaps also the federal courts, which would be flooded with applications from federal prisoners (28 U.S.C. § 2255) and state prisoners (28 U.S.C. § 2241)—from engaging in future constructive decision-making in the area of criminal procedure.

(3) Retroactivity of a new exclusionary rule would impair the ability of the state judicial legal systems to provide post-conviction relief for those individuals whose present incarceration truly amounts to "intolerable restraint"

It would certainly seem that under established principles of comity and exhaustion of state remedies, the state courts would be given the first opportunity to consider a claim for post-conviction relief which is based upon a new exclusionary rule. *Cf.* 28 U.S.C. § 2254; *Case* v. *Nebraska,* 381 U. S. 336 (1965). Clearly, however, the retroactive application of a new exclusionary rule would impose tremendous strains upon the bench and bar in all of the states —very possibly to the detriment of the individuals whose claims for post-conviction relief are more deserving under established principles of criminal justice.

The kinds of claims which have historically been recognized as warranting post-conviction relief are those which go to the fairness of the trial process itself, and which

raise genuine doubt as to the reliability of the adjudication of guilt.[1] The absence of counsel at trial (*Gideon* v. *Wainwright*, 372 U. S. 335 [1963]); the denial of opportunity to appeal (*Griffin* v. *California*, 351 U. S. 12 [1956]; *Eskridge* v. *Washington*, 357 U. S. 214 [1958]; *Douglas* v. *California*, 372 U. S. 356 [1963]); the use of an involuntary confession (*Reck* v. *Pate*, 367 U. S. 443 [1961]; *Fay* v. *Noia*, 372 U. S. 391 [1963]); the use of an unfair and unreliable procedure for testing voluntariness (*Jackson* v. *Denno*, 378 U. S. 368 [1964]); the knowing use of perjured testimony (*Mooney* v. *Holohan*, 294 U. S. 103 [1935]); and trial under conditions of mob domination or inflammatory publicity (*Moore* v. *Dempsey*, 261 U. S. 86 [1923]; *Irwin* v. *Dowd*, 359 U. S. 394 [1959]), fall into this category. These are the kinds of cases in which it can truly be said that continued imprisonment is intolerable (*cf. Fay* v. *Noia*, *supra* at 401-02, 441); where a defendant has really been afforded "no process of law".[2] These are the cases in which the judgment was, in effect, void *ab initio*, and thus subject to attack on federal habeas corpus just as any void judgment is always open to collateral attack. See *Fay* v. *Noia*, *supra*, at 423.

These are the kinds of cases for which many of the states have in the past sought to provide post-conviction relief—and for which, where previous remedies have proven too narrow, the states are now in the process of broadening the remedies under the impetus of the *Noia* decisions. These are the meritorious cases—the ones in which a hearing may well be warranted in order to de-

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[1] See Brief for Respondent in *Angelet* v. *Fay*, No. 578, Oct. Term 1964, pp. 18-20, 32-36; *cf.* Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56 (1965); *Linkletter* v. *Walker*, *supra*, at 636 n. 20.

[2] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-460 (1963). See also Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 340-341.

termine both the truth of the charges and the desirability of overlooking a prior failure to raise serious issues of both trial fairness and of reliability—upon which the states should be able to concentrate their resources. Indeed, that is clearly the purpose of the new statutes and court rules which have come into being since the *Noia* decision.[1] To require the states to afford collateral relief in a case where, by contrast, there is no doubt as to the factual reliability of a defendant's statement, where the statement was used at a trial at which the defendant had adequate counsel and at which existing law permitted its use, would be to establish an entirely new and unnecessary concept of collateral relief.

The result, inevitably, would be unending litigation by convicted prisoners, and a wholly unwarranted drain on legal resources—the time of judges, lawyers, court personnel and policemen, as well as public funds—at a time when these resources can be far more beneficially allocated to present responsibilities and to the pursuit of constructive legal developments in other areas of the criminal law.

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[1] Recent state statutes, court rules and judicial decisions are collected in the concurring opinion of Mr. Justice Brennan in *Case* v. *Nebraska*, 381 U. S. 336 (1965) at 340, 345-346, n. 8. See also Resolution XIV, *Post-Conviction Remedies*, adopted without opposition at the 59th Annual Meeting of the National Association of Attorneys Generals, held July 25-30, 1965. The resolution urges all states which have not yet done so "to adopt, either by statute or rule of court, post-conviction procedures which make it possible to adjudicate all claims of constitutional right properly presented by persons convicted in state court criminal proceedings."

CONCLUSION

For all the foregoing reasons we respectfully submit that the Court, in disposing of these cases, should observe the limiting principles of constitutional review which we have endeavored to set forth.

Dated: New York, New York, February 21, 1966.

Respectfully submitted,

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JOHN F. DAVIS,

IN THE

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October Term, 1965
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Petitioner,

vs.

ROY ALLEN STEWART,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

PETITIONER'S REPLY BRIEF ON THE MERITS.

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PETITIONER'S REPLY BRIEF ON THE MERITS.

Introduction.

In our opening brief, we argued that the facts of this case differ from those of *Escobedo* in every significant respect, including the one fact crucial to the *Escobedo* reversal: that in *Escobedo* the state laid its heavy hand between a suspect and his attorney, but did not do so here. We argued also that the exclusionary rule adopted in *Dorado* and applied in this case is an unnecessary and undesirable extension of Escobedo, an extension made in the face of the explicit and limited holding of the *Escobedo* decision.

We had hoped that in joining issue with us Stewart would have met us on our own ground. To the contrary, he has attributed to us imaginary positions and concessions, dismissed with fleeting mention the serious question of policy which we raised, and advanced as an alternative ground for affirming the judgment a constitutional theory which he never urged upon the California Court, a theory based upon a misconstruction of the applicable California statute and fortified by the failure to consult a calendar.

We note as well, and with some surprise, that at this late stage of the litigation there is no agreement as to what act or acts Stewart admitted committing. For notwithstanding the testimony of the investigating officers, notwithstanding his own testimony, notwithstanding the argument of his own counsel to the jury, and notwithstanding the text and context of the confession itself, Stewart suggests in his brief that he did not admit having committed the murder for which he was convicted at his trial. (Resp. Br. pp. 26-28, and fn. 19.) Before proceeding any further, his suggestion should be put to rest.

It is undisputed that Miss Mitchell was kicked to death. On her right ear and on the left temporal area of her head were crescent-shaped lacerations made by a hard object with a curved-contact surface which could have been a shoe. [Rep. Tr. pp. 649-651, 656-657.] The officers did not conceal from Stewart the fact that she had died. Indeed, a photograph of her

head was shown to him during the tape-recorded conversation and Officer Logue described one of her injuries to him as "the one that caused her death . . ." [Rep. Tr. p. 738.]

On direct examination, Logue testified that prior to the tape-recorded conversation Stewart said that "he had caused the death of Mrs. Mitchell, that was the sustance of the conversation." [Rep. Tr. p. 733.] According to Officer Mangiameli, Stewart made a statement to the "effect" that he snatched her purse, took her watch and kicked her. [Rep. Tr. p. 963.] In closing argument, Stewart's attorney said that his client had admitted "to the investigating police officers that he had committed at least, not at least, at most the one offense, Count No. 7" (the murder count). [Rep. Tr. p. 1202.] During the tape-recorded conversation, Stewart repeatedly said that he "may have" or "could have" kicked Miss Mitchell. [Rep. Tr. pp. 736, 738, 745.] He testified that he told the officers that he had kicked her. [Rep. Tr. pp. 844-845, 874.] At the inception of the tape-recording, Logue told Stewart: "Now you said you did it, *you're sorry,* and that is just exactly what the word is going to be as far as we are concerned." [Rep. Tr. p. 734.] All the foregoing lends weight to the testimony of Logue on redirect that when he first entered the room he said: "Roy, you killed that old woman over on Cimarron Street and you are not even sorry," and that when Logue repeated the statement Stewart said: "Yes, I'm sorry. I'm sorry I killed her. I didn't mean to kill her." [Rep. Tr. p. 789.]

We have gone into this subject at length because of Stewart's further suggestion that "after five days of secret interrogation on a string of crimes, including robbery, rape and murder," he "decided to end the seemingly interminable jailhouse proceedings by confessing simply that he took one woman's purse. In short, he may have thought he could 'plea bargain' for himself, thereby avoiding the risk of a more serious conviction, whether guilty or innocent." (Resp. Br. p. 26.) This, we might add, is not only inconsistent with his own testimony at the trial, but it fails to explain why, instead of confessing to some other offense, he would have chosen to admit having robbed the one woman who died as a result of the robbery.

ARGUMENT.

I.

In Reply to Stewart's Escobedo Claims.

As we understand Stewart's argument, it proceeds as follows: 1. Where the right to counsel exists, the right does not depend upon a request for counsel. 2. Prior to the filing of formal charges, the right to counsel matures when the "accusatory stage" comes into being, to wit, when a person is in police custody, is the "focus" of police suspicion, and has been subjected to a "process of interrogations" likely to "elicit incriminating statements." 3. Once the "accusatory stage" has arisen, the denial of a request for counsel is relevant only in deciding whether there has been a waiver of counsel. For the first and third propositions, Stewart cites *Carnley v. Cochran,* 369 U.S. 506. For the second, he cites *Escobedo.*

The argument is based, we submit, upon the mistaken assumption that the right to counsel during police interrogation is the same as the right to counsel at trial. If it is not, then *Carnley* is inapposite, for *Carnley* was concerned with the right to counsel during formal judicial proceedings.

The right to counsel at trial is of course absolute. If the defendant cannot afford an attorney the state must get him one. (*Gideon v. Wainwright,* 372 U.S. 335.) But we do not think that *Escobedo* articulated an absolute right to counsel during police interrogation, a right in which all suspects have a contingent executory interest vesting when the police begin to ask them questions. To argue otherwise is to divorce the case from its facts, from its holding, and from its careful use of

words of limitation: "under the circumstances," "in the context of this case," "where, as here," "under the circumstances here." (*Escobedo v. Illinois,* 378 U.S. 478 at 479, 485, 490, 492.) Furthermore, as we have repeatedly emphasized, the Chicago police took affirmative steps to keep Escobedo and his lawyer apart. We find it difficult to believe that this fact was not one of the totality of circumstances which led this Court to the conclusion that Escobedo had been denied counsel.

Turning from the text of *Escobedo,* we wish to amplify two of the arguments contained in our opening brief.

1. We said that in our view the effects of the "Dorado rule" will be "grave, grave enough to give pause." (Pet. Br. p. 46.) Stewart of course disagrees. (Resp. Br. pp. 40-42.) Others have assumed an attitude of studied neutrality, suggesting that because of the conflict in viewpoints the problem may be set to one side. (Pet. Br. in *Miranda v. Arizona,* No. 759, October Term, 1965, p. 45.) But this is Russian roulette with a vengeance. For if the "Dorado rule" is adopted by this Court, its consequences will be widespread beyond all imagination. Looking to the country at large, there were during the year 1963 a total of 4,437,786 arrests. Looking to California alone, there were in that year 98,535 adult felony arrests, 595,992 adult misdemeanor arrests and 244,312 arrests of juveniles. Looking, alone, to the city where this brief is being written, the Los Angeles police conducted 183,299 criminal investigations during 1963, they made 171,252 adult arrests and 24,633 juvenile arrests and they answered 2,425,205 calls for police service. (Barrett, "Criminal Justice: The Problem of Mass Production," in

Jones, ed., The Courts, The Public and the Law Explosion, at p. 95.) It is, therefore, a bit premature for Stewart to assert that all society will face is the "occasional release of the guilty." (Resp. Br. p. 45.)

2. We challenged also the assumptions of the California Supreme Court that the "Dorado rule" was necessary to prevent coercion and to insure the equal treatment of suspects in police custody. (Pet. Br. pp. 38-40.) As to the first point we have nothing further to add, but as to the second point we wish to call this Court's attention to the recent Bazelon-Katzenbach correspondence and to quote briefly from the deliberately measured words of the Attorney General of the United States:

> "Your suggestion that police questioning will primarily affect the poor and, in particular, the poor Negro, strikes me as particularly irrelevant. The simple fact is that poverty is often a breeding ground for criminal conduct and that inevitably any code of procedure is likely to affect more poor people than rich people. For reasons beyond their control, in Washington many poor people are Negroes; in Texas, Mexicans; in New York City, Puerto Ricans. A system designed to subject criminal offenders to sanctions is not aimed against Negroes, Mexicans or Puerto Ricans in those jurisdictions simply because it may affect them more than other members of the community.
>
> "There are, of course, inequities in our society resulting from differences in wealth, education, and background, and these inequities are some-

times reflected in the outcome of the criminal process. Poverty, ignorance and instability produced by wretched living conditions may make an individual's criminal acts more susceptible to discovery and proof. But I am sure you will agree these same conditions are major causes of crime. So long as they exist and lead an individual to victimize his fellow citizens, government cannot and should not ignore their effects during a criminal investigation. Otherwise, so many persons guilty of crime would be insulated from conviction that our system of prevention and deterrence would be crippled. . . .

". . . And to a man convicted because he was careless in leaving a fingerprint, or too poor to change his tell-tale clothes after a crime, there is no more galling governmental act than the release of one who betrayed himself in answering a question. Furthermore, in the elimination of questioning a high price would be paid by the innocent who are exculpated early in the criminal process by police questioning, and by those who appear at first to deserve a more serious charge than is eventually filed after questioning. The introduction of counsel at this early stage would not, as you suggest, promote this screening, for there must be the possibility of an incriminating as well as an exculpatory outcome if there is to be imaginative and energetic investigatory questioning." (Equal Treatment in the Enforcement of the Criminal Law: The Bazelon-Katzenbach Letters, 56 J. Crim. L. C. & P. S. 498 at 501-02.)

II.

In Reply to Stewart's Wong Sun Claims.

Stewart made his confession on February 5, 1963, after less than three hours of questioning by Officers Logue and Mangiameli. As an alternative ground for affirming the judgment, he contends that the confession was obtained during a period of illegal detention in "brazen violation of the California statutes limiting police authority to detain arrested persons." (Resp. Br. p. 46.) And he urges that it was therefore inadmissible under *Wong Sun v. United States,* 371 U.S. 471.

The arrest took place at 7:15 p.m. on January 31, 1963 and Stewart was taken before a magistrate on February 5th, after he had confessed. [Rep. Tr. p. 698; Resp. Br. p. 3 and fn. 1.] January 31st was a Thursday and February 5th was a Tuesday.

The governing statute is Cal. Penal Code, Section 825. (Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Cal. L. Rev. 11 at 30, fn. 79, and cases cited.) At the time of Stewart's arrest, the relevant paragraph of the statute read as it reads now:

> "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following."

Stewart has explicitly conceded the constitutionality of Section 825. (Resp. Br. p. 46.) Under the statute, Sundays and holidays are specifically excluded from the 48-hour period of detention. The term "holidays" includes Saturdays, for Saturday is a holiday in the Municipal Court. (Cal. Government Code, Sec. 72305; *People v. Mitchell,* 209 Cal. App. 2d 312 at 320, 26 Cal. Rptr. 89 at 93.) Excluding Saturday, February 2nd, and Sunday, February 3rd, the 48 hours expired at 7:15 p.m. on Monday, February 4th. (*People v. Ross,* 236 A.C.A. 387 at 391, 46 Cal. Rptr. 41 at 43.) At that time "the court in which the magistrate is sitting" was "not in session," and by virtue of the statutory proviso, added in 1961, the detention period was "extended to include the duration of the next regular court session on the judicial day immediately following," that is, until the close of court on Tuesday, February 5th.[1]

The foregoing, we submit, is sufficient to dispose of Stewart's claim that his confession was obtained during a period of unlawful detention. Assuming, however, for the sake of argument, and solely for the sake of argument, that there was an unlawful detention, we would commend to this Court the reasoning of Justice Traynor in *Rogers v. Superior Court,* 46 Cal. 2d 3 at 10-11, 291 P. 2d 929 at 933-34:

> "There is a basic distinction between evidence seized in violation of the search and seizure provisions of the Constitution of the United States and

---

[1]Reproduced as Appendix A to this brief is Section 775.15 of the Los Angeles Police Department Manual. Reproduced as Appendix B is an informal guide to investigators on felony release time limitations. The guide is a "rule of thumb" in general use but has no official status.

the Constitution of California and the laws enacted thereunder, and voluntary statements made during a period of illegal detention. It may be true, as petitioner contends, that had he been arraigned within 48 hours and advised of his rights, he would not have volunteered to say anything. (*Cf. People v. Stroble,* 36 Cal. 2d 615, 626, 627 [226 P.2d 330]; and see *People v. Zammora,* 66 Cal. App. 2d 166, 220 [152 P.2d 180].) Nevertheless, there is lacking the essential connection between the illegal detention and the voluntary statements made during that detention that there is between the illegal search and the evidence obtained thereby, or between the coercion and the confession induced thereby. The voluntary admission is not a necessary product of the illegal detention; the evidence obtained by an illegal search or by a coerced confession is the necessary product of the search or of the coercion. When questioned by arresting officers a suspect may remain silent or make only such statements as serve his interest; the victim of an illegal search, however, has no opportunity to select the items to be taken by the rummaging officer (*State v. Sanford, State v. Ellis,* 354 Mo. 998, 1012 [193 S.W.2d 37, 38] concurring opinion of Hyde, J.; *State v. Guastamachio,* 137 Conn. 179 [75 A.2d 429, 431]; *cf., Milbourn v. State,* 212 Ind. 161 [8 N.E.2d 985, 986]; *Quan v. State,* 185 Miss. 513 [188 So. 568, 569]; 14 So.Cal.L. Rev. 477), and the victim of a coerced confession has been deprived of any choice. . . ."

Conclusion.

We accordingly renew our request that the judgment of the Supreme Court of California be reversed.

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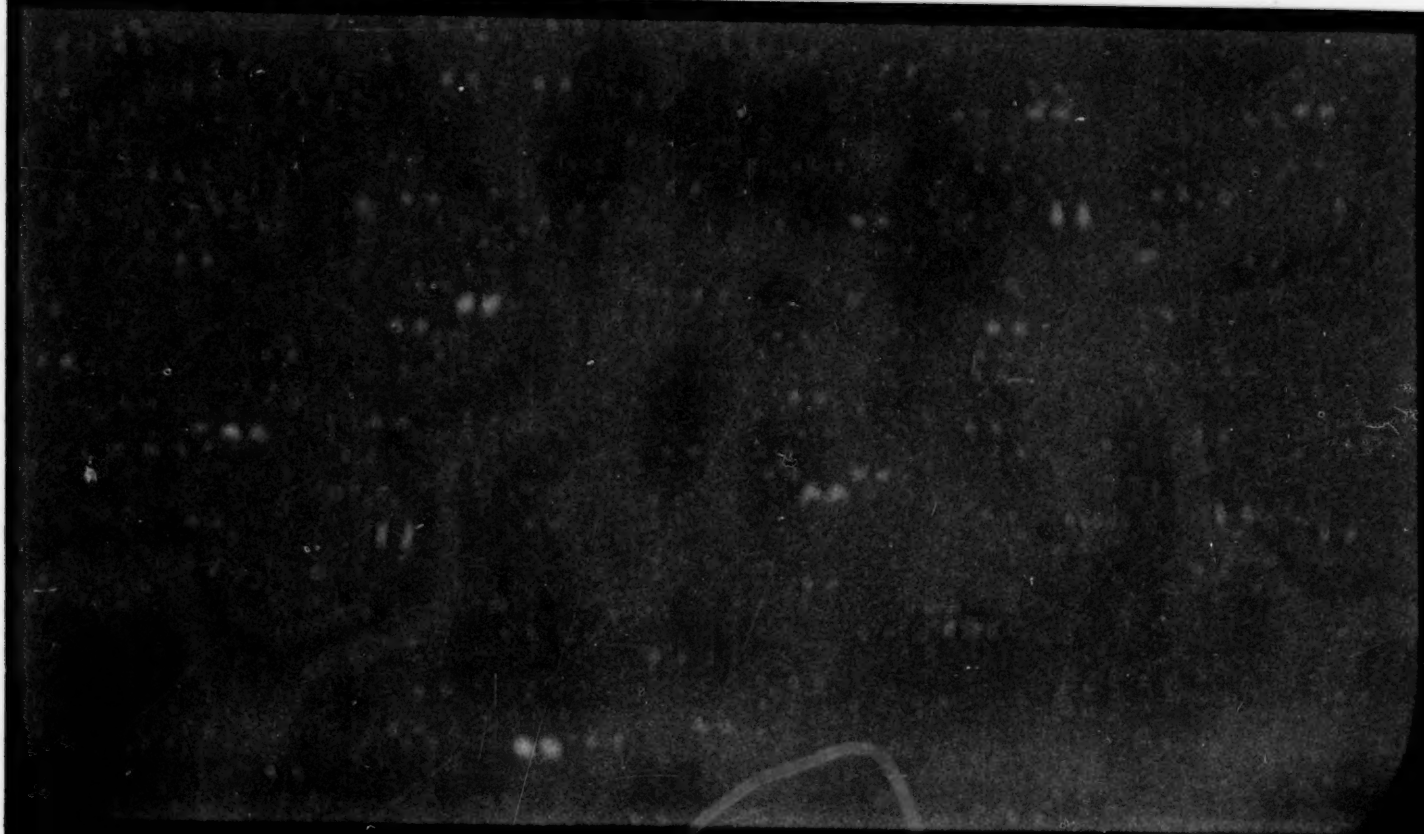

APPENDIX A.

775.15 ARRAIGNMENT OR RELEASE OF PRISONERS WITHIN FORTY-EIGHT HOURS. The assigned investigating officer shall be responsible to cause the arraignment or release of a prisoner without unnecessary delay, and, in any event, within forty-eight hours from the time of arrest excluding Saturdays, Sundays and holidays. If the investigating officer is not available at the time a prisoner is due to be arraigned or released, the watch commander of the investigating division shall be responsible to effect the arraignment or release.

Exception: When the forty-eight hours expire at a time when the court is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

APPENDIX B.

The following guide is offered to aid investigators on felony release time limitations.

ARREST TIME	RELEASE TIME
Mon 9am to 4pm	Wed 9am to 4pm
Mon 4pm to Tues 9am	Thurs 4pm
Tues 9am to 4pm	Thurs 9am to 4pm
Tues 4pm to Wed 9am	Fri 4pm
Wed 9am to 4pm	Fri 9am to 4pm
Wed 4pm to Thurs 9am	Mon 4pm
Thurs 9am to 4pm	Mon 9am to 4pm
Thurs 4pm to Fri 9am	Tues 4pm
Fri 9am to 4pm	Tues 9am to 4pm
Fri 4pm to Mon 9am	Wed 4pm

EXCLUDING COURT HOLIDAYS

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On Writ of Certiorari to The Supreme Court of the State of California.

PETITION FOR REHEARING.

Petitioner respectfully prays the Court to grant a rehearing in the above-entitled case, which was decided and is reported in *Miranda v. Arizona,* 86 S. Ct. 1602.

ARGUMENT.

I.

The Miranda Rules Should Be Reconsidered and Rejected.

The *Miranda* decision holds that no statement made to the police by any person subjected to custodial interrogation may be received in evidence without meticulous compliance with procedural safeguards designed to protect the Fifth Amendment privilege against self-incrimination. In so holding, the Court has abandoned

the traditional test for determining the admissibility of extra-judicial statements, has rendered vain and void the efforts of the American Law Institute and other distinguished groups to suggest workable rules of police interrogation, and has created an elaborate system of warnings and waivers which will deprive society of a category of evidence previously thought to be highly reliable and essential to the solution of countless crimes.

So radical a departure from existing constitutional theory finds scant warrant, if any, in the materials cited by the Court. These consist, in the main, of references to a handful of flagrant cases decided under the traditional test of voluntariness (86 S. Ct. 1602, 1613, fns. 6, 7), and of copious extracts from manuals of police interrogation which no one suggests were used in questioning Miranda, Vignera, Westover or Stewart. (86 S. Ct. 1602, 1613-1617.)

Based upon this insecure empirical foundation, the Court has imposed a series of procedural requirements which go far beyond the most far-reaching interpretations of *Escobedo v. Illinois,* 378 U.S. 478, adopted by any state or federal court. (See *People v. Dorado,* 62 Cal. 2d 338, 398 P. 2d 361.) These requirements, we submit are not only unnecessary to prevent the occasional case of police coercion and undesirable as restrictions upon the legitimate investigative powers of the police. They will create for both police and prosecutor a nightmare of uncertainty.

The *Miranda* rules clearly apply to in-custody interrogation. However, the Court also says that they apply to the questioning of a person "otherwise deprived of his freedom of action in any significant way." (86 S. Ct. 1602, 1612.) Does the phrase include the motorist

stopped on the highway for a traffic infraction? The suspected drunk driver? The individual visited at home or at work by a significant number of policemen? The individual requested but not ordered to come to the police station or the prosecutor's office to discuss an informal complaint? The rules clearly do *not* apply to "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process . . ." (86 S. Ct. 1602, 1629.) Do these phrases refer simply to the populace at large, or may the police ask uncoercive questions of persons found at the scene of a crime, who may eventually be placed in custody, but whom the police do not have probable cause to arrest? None of the foregoing questions are answered in the opinion of the Court. But the situations which they mirror occur every hour of every day and are of the very stuff of law-enforcement.

Furthermore, assuming the *Miranda* rules do apply in a given case, how are the police to discharge the heavy burden of proving that a person has made a knowing and intelligent waiver of his rights after being advised of them? What of the individual who demands counsel and then, without prompting, decides to change his mind? Must he be left alone? Can he be questioned? What of the person who, *after* being taken into custody, initiates a conversation with his jailer and proceeds to incriminate himself? Can his statement safely be offered in evidence? Or must his tongue be stilled? To these questions and a host of others like them, the Court has returned no answer. We submit that the Court should re-examine, and upon re-examination reject rules so damaging to the administration of criminal justice and so redolent of further confusion.

The instant case is one which cries out for the re-examination we urge upon the Court. Here, uncoercive police questioning was the only means of solving a brutal and unwitnessed murder. The Court suggests that there was no need to interrogate respondent because "articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation." (86 S. Ct. 1602, 1631, fn. 51.) But that fact, standing alone, would have been insufficient to sustain a conviction for robbery. (*People v. Leary*, 28 Cal. 2d 727, 172 P. 2d 34; see also, *People v. McFarland*, 58 Cal. 2d 748, 376 P. 2d 449.) Four other persons were in the house at the time of Stewart's arrest, among them his common-law wife, who lived there, and his niece, who was there nearly every day. [Rep. Tr. pp. 747-748, 750, 882-883, 888-889.] Confronted by a house full of stolen property the officers had, consistent with their duties, no practical alternative to asking questions in an effort to discover who had obtained the property and how it had been obtained.

II.

Stewart's Conviction Should Be Upheld Under Johnson v. New Jersey.

Miranda was decided on June 13th. One week later, the Court held that *Escobedo v. Illinois* would govern only in cases tried after the date of *Escobedo* and that *Miranda* would govern only in cases tried after June 13th. (*Johnson v. New Jersey*, 86 S. Ct. 1772.) Respondent was put to his trial long before *Escobedo*. We submit that under *Johnson*, the *Miranda* rules cannot serve as a basis for overturning his conviction.

Conclusion.

For the foregoing reasons, a rehearing should be granted and the judgment of the California Supreme Court should be vacated.

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Certificate of Counsel.

I certify that this petition is presented in good faith and not for delay.

GORDON RINGER

OPINION

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
Carl Calvin Westover, Petitioner, 761 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recen in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). There, in the four cases before us, law enforcement officials to the defendant into custody and interrogated him in police station for the purpose of obtaining a confe sion. The police did not effectively advise him of h right to remain silent or of his right to consult wi his attorney. Rather, they confronted him with a alleged accomplice who accused him of having perp trated a murder. When the defendant denied the accus tion and said "I didn't shoot Manuel, you did it," the handcuffed him and took him to an interrogation roon There, while handcuffed and standing, he was questione for four hours until he confessed. During this interroga tion, the police denied his request to speak to his attor ney, and they prevented his retained attorney, who ha come to the police station, from consulting with him. A his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpreta- tion and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.[1] A wealth of scholarly material has been written tracing its ramifications and underpinnings.[2] Police and prose-

[1] Compare *United States* v. *Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965) with *Collins* v. *Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People* v. *Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

[2] See, *e. g.*, Enker and Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogations, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time (1965); Dowling, Escobedo and

cutor have speculated on its range and desirability.[2] We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

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Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 156 (1965).

The complex problems also prompted discussions by jurists. Compare Bazelon, Law, Morality and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

[2] For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar. Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo:* "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra*, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S., 21 (1961).

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens* v. *Virginia*, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evidenced in many of these earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker*, 161 U. S. 591, 596–597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems* v. *United States*, 217 U. S. 349, 373 (1910):

". . . our contemplation cannot be only what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[5]

[5] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The 1961 Commission on Civil Rights found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).[7]

[Wickersham Report]; Booth, Confessions and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

[6] *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Leyra* v. *Denno*, 347 U. S. 556 (1954). See also *Williams* v. *United States*, 341 U. S. 97 (1951).

[7] In addition, see *People* v. *Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat* v. *Harlib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier* v. *State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

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strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner* v. *People*, 113 Col. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People* v. *Matlock*, 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Pott, The Preliminary Examination and "The Third Degree," 2 Baylor L. Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965).

> are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931), 5.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers* v. *Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These

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[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator (1952), 97–115. Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody (1965), 244–437, 490–521; LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1965 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47–65.

texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." [10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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[9] The methods described in Inbau and Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1959), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau and Reid, *supra*, at 1.

more reluctant to tell of his indiscretions of criminal behavior within the walls of his own home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." [11]

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than to court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited attraction to women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

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[11] O'Hara, *supra*, at 99.

[12] Inbau and Reid, *supra*, at 34–43, 87. For example, in *Leyra* v. *Denno*, 347 U. S. 556 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," *id.*, at 562, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," *id.*, at 582.

[13] Inbau and Reid, *supra*, at 43–55.

One writer describes the efficacy of these characteristics in this manner:

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. This method should be used only when the guilt of the subject appears highly probable." [14]

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

> "Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indi-

[14] O'Hara, *supra*, at 112.

> cation that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?" [15]

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial." [16]

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

> ". . . In this technique, two agents are employed, Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room." [17]

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[15] Inbau and Reid, *supra*, at 40.

[16] *Ibid.*

[17] O'Hara, *supra*, at 104, Inbau and Reid, *supra*, at 58–59. See *Spano* v. *New York*, 360 U. S. 315 (1959). A variant on the tech-

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." [18] Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

> "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." [19]

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent im-

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nique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski* v. *New York*, 324 U. S. 401, 407 (1945): "Why all this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

[18] O'Hara, *supra*, at 105–106.

[19] *Id.*, at 106.

presses the subject with the apparent fairness of his interrogator." [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." [21]

Few will persist in their initial refusals to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' " [22]

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[20] Inbau and Reid, *supra*, at 111.

[21] *Ibid.*

[22] Inbau and Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired object may be obtained." [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24]

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[23] Inbau and Reid, Lie Detection and Criminal Interrogation (3d ed. 1953), 185.

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 24, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957).

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.*, at 307–310. The defendant in *Lynumn* v. *Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court similarly reversed the conviction of a defendant in *Haynes* v. *Washington*, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda* v. *Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera* v. *New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover* v. *United States*, the defendant was

[25] In the fourth confession case decided by the Court in the 1963 Term, *Fay* v. *Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States* v. *Murphy*, 222 F. 2d 698 (C. A. 2d Cir., 1955) (Frank, J.); *People* v. *Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California* v. *Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patented psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[28] The current practice of incom-

[28] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

municado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Per-

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fessor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[27] Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, 3 Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakha, 5 Judaism 53 (Winter 1956).

haps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637–1645). He resisted the oath and declaimed the proceedings, stating:

> "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Heller and Davies, The Leveller Tracts 1647–1653 (1944), 454.

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

[28] See Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 9–11 (1949); 8 Wigmore, Evidence (McNaughton rev., 1961), 289–295. See also Lowell, The Judicial Use of Torture, 11 Harv. L. Rev. 220, 290 (1897).

[29] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935); *Ullmann* v. *United States*, 350 U. S. 422, 445–449 (1956) (Douglas, J., dissenting).

against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States* v. *Grunewald*, 233 F. 2d 556, 579, 581–582 (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55–57, n. 5 (1964); *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interroga-

tion. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson* v. *SACB*, 382 U. S. 70, 81 (1965); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72–73 (1920); *Counselman* v. *Hitchock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[50]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram* v. *United States*, 168 U. S. 532, 542 (1897), this Court held:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

> "Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

[50] Compare *Brown* v. *Walker*, 161 U. S. 596 (1896); *Quinn* v. *United States*, 349 U. S. 155 (1955).

would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent . . . ." 168 U. S., at 549. And see, *id.*, at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan* v. *United States*, 266 U. S. 1. He stated:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram* v. *United States*, 168 U. S. 532." 266 U. S., at 14–15.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured

its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover* v. *United States*, stating: "We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." [21]

Because of the adoption by Congress of Rule 5 (a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U. S., at 343–344, and in *Mallory*, 354 U. S., at 455–456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[22]

Our decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

[21] Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40–49, n. 44, *Anderson* v. *United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17–18, *McNabb* v. *United States*, 318 U. S. 332 (1943).

[22] Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964), and *Griffin* v. *California*, 380 U. S. 609 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U. S., at 7–8.[33] The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from

[33] The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. *Rogers* v. *Richmond*, 365 U. S. 534, 544 (1961); *Wan* v. *United States*, 266 U. S. 1 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, *e. g.*, *Malinski* v. *New York*, 324 U. S. 401, 404 (1945); *Bram* v. *United States*, 168 U. S. 532, 540–542 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, *Jackson* v. *Denno*, 378 U. S. 368 (1964); *United States* v. *Carignan*, 342 U. S. 36, 38 (1951); see also *Wilson* v. *United States*, 162 U. S. 613, 624 (1896). Appellate review is exacting, see *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960) Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963). In addition, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964).

making a free and rational choice.[34] The implications of this proposition were elaborated in our decision in *Escobedo* v. *Illinois*, 378 U. S. 478, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U. S., at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.

A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo*, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U. S., at 481, 488, 491.[35] This heightened his dilemma, and

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[34] See *Lisenba* v. *California*, 314 U. S. 219, 241 (1941); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Spano* v. *New York*, 360 U. S. 315 (1959); *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Haynes* v. *Washington*, 373 U. S. 503 (1963).

[35] The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its

made his later statements the product of this compulsion. Cf. *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pre-trial privilege, noted in many of the Court's prior decisions: the protection of rights at trial.[56] That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Mapp* v. *Ohio*, 367 U. S. 643, 685 (1961) (HARLAN, J., dissenting). Cf. *Pointer* v. *Texas*, 380 U. S. 400 (1965).

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wake. See *People* v. *Donovan*, 13 N. Y. 2d 148, 193 N. E. 2d 628, 243 N. Y. S. 2d 841 (1964) (Fuld, J.).

[56] *In re Groban*, 352 U. S. 330, 340–352 (1957) (BLACK, J., dissenting); Note, 73 Yale L. J. 1000, 1048–1051 (1964); Comment, 31 U. Chi. L. Rev. 313, 320 (1964) and authorities cited.

III.

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and

unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on infor-

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[37] See p. 16, *supra*. Lord Devlin has commented:

"It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worst for you if you do not." Devlin, The Criminal Prosecution in England (1958), 32.

In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1041–1044 (1966). See also *Bram* v. *United States*, 168 U. S. 532, 562 (1897).

mation as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; [38] a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere

[38] Cf. *Betts* v. *Brady*, 316 U. S. 455 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, *Betts* v. *Brady* Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962).

warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See *Crooker* v. *California*, 357 U. S. 433, 443–448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request

may be the person who most needs counsel. As the California Supreme Court has aptly put it:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it." *People* v. *Dorado*, 62 Cal. 2d 338, 351, 398 P. 2d 361, 369–370, 42 Cal. Rptr. 169, 177–178 (1965) (Tobriner, J.).

In *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.[39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of

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[39] See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 480 (1964).

circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.[40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.[41] Denial

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[40] Estimates of 50–90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737, 738–739 (1961); Birzon, Kasanof and Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buff. L. Rev. 428, 433 (1965).

[41] See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time (1965), 64–81. As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), p. 9:

"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While govern-

of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Douglas* v. *California*, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.[42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.[43]

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any man-

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ment may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[42] Cf. *United States ex rel. Brown* v. *Fay*, 242 F. Supp. 273, 277 (D. C. S. D. N. Y. 1965); *People* v. *Witenski*, 15 N. Y. 2d 392, 207 N. E. 2d 358, 259 N. Y. S. 2d 413 (1965).

[43] While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

ner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[44] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may do so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

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[44] If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also *Glasser* v. *United States*, 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives

some information on his own prior to invoking his right to remain silent when interrogated.[45]

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Sim-

[45] Although this Court held in *Rogers* v. *United States*, 340 U. S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

ilarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo* v. *Illinois*, 378 U. S. 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of

responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[46]

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime,[47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privi-

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[46] The distinction and its significance has been aptly described in the opinion of a Scottish court:

"In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect." *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.).

[47] See *People* v. *Dorado*, 62 Cal. 2d 338, 354, 398 P. 2d 361, 371, 42 Cal. Rptr. 169, 179 (1965).

lege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[48]

IV.

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227, 240–241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same

[48] In accordance with our holdings today and in *Escobedo* v. *Illinois*, 378 U. S. 478, 492, *Crooker* v. *California*, 357 U. S. 433 (1958) and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958) are not to be followed.

> rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).[49]

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." [50]

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his

[49] In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[50] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.[51] Further examples are chronicled in our prior cases. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Malinski* v. *New York*, 324 U. S. 401, 402 (1945).[52]

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[51] Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[52] Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Lynumn* v.

It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings, with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California* v. *Stewart*, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause.[53]

Illinois, 372 U. S. 528, 537–538 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

[53] See, *e. g.*, Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.[54] A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

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released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 11477, S. 2970, S. 3325, and S. 3355 (July 1958), pp. 40, 78.

[54] In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.

"We can have the Constitution, the best laws in the land, and the most honest reviews by courts—but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually—and without end—be violated . . . . The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative.

". . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 177–182 (1952).

rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

"At the oral argument of the above cause, MR. JUSTICE FORTAS asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation and am submitting herewith a statement of the questions and of the answers which we have received.

"'(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?

"'The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F. 2d 685 (1965), and *Jackson* v. *U. S.*, 337 F. 2d 136 (1964), cert. den. 380 U. S. 985.

"'After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warn-

ing to read counsel of his own choice, or anyone else with whom he might wish to speak.

"'(2) When is the warning given?

"'The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U. S. v. Konigsberg*, 336 F. 2d 844 (1964), cert. den. 379 U. S. 930, 933, but in any event it must precede the interview with the person for a confession or admission of his own guilt.

"'(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?

"'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Shultz* v. *U. S.*, 351 F. 2d 287 (1965). It may be continued, however, as to all matters *other* than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram* v. *U. S.*, 354 F. 2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

"'A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell* v. *U. S.*, 351 F. 2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private.

"'(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?

"'If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge.'" [55]

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.[56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912

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[55] We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[56] Among the crimes within the enforcement jurisdiction of the FBI are kidnaping, 18 U. S. C. § 1201 (1964 ed.), white slavery, 18 U. S. C. §§ 2421–2423 (1964 ed.), bank robbery, 18 U. S. C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U. S. C. §§ 2311–2317 (1964 ed.), all manner of conspiracies, 18 U. S. C. § 371 (1964 ed.), and violations of civil rights, 18 U. S. C. §§ 241–242 (1964 ed.). See also 18 U. S. C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

under the Judge's Rules is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police.[57]

[57] [1964] Crim. L. Rev. 166–170. These Rules provide in part:

"II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

"'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

. . . . .

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.

. . . . . .

"IV. All written statements made after caution shall be taken in the following manner:

"(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says.

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him . . . .

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

. . . . . .

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to

The right of the individual to consult with an attorney during this period is expressly recognized.[58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation.[59] In India, confessions made to police not in the presence of a magistrate have been ex-

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make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, The Criminal Prosecution in England (1958), 137–141.

Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, *e. g.*, [1964] Crim. L. Rev., at 182; and articles collected in [1960] Crim. L. Rev., at 298–356.

[58] The introduction to the Judge's Rules states in part:

"These Rules do not affect the principles

"(c) That every person at any stage of an investigation should be able to communicate and consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so . . . ." [1964] Crim. L. Rev., at 166–167.

[59] As stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.):

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

cluded by rule of evidence since 1872, at a time when it operated under British law.[60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895.[61] Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.[62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.[63] There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution,

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[60] "No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Indian Evidence Act, § 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India (1962), 553–569. To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: "[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not to make a confession." *Sarwan Singh* v. *State of Punjab*, 44 All India Rep. 1957, Sup. Ct. 637, 644.

[61] 1 Legislative Enactments of Ceylon (1958), 211.

[62] 10 U. S. C. § 831 (b) (1964 ed.).

[63] *United States* v. *Rose*, 24 Court-Martial Reports 251 (1957); *United States* v. *Gunnels*, 23 Court-Martial Reports 354 (1957).

whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.[64]

It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making.[65] We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See *Hopt* v. *Utah*, 110 U. S. 574 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our

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[64] Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20 (3). See Tope, The Constitution of India (1960), 63–67.

[65] Brief for United States in No. 761, *Westover* v. *United States*, pp. 44–47; Brief for the State of New York as *amicus curiae*, pp. 35–39. See also Brief for the National District Attorneys Association as *amicus curiae*, pp. 23–26.

responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

V.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. *Miranda* v. *Arizona.*

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present.[66] Two hours later, the

[66] Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that during the interrogation he did not tell Miranda that anything he said would be held against him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me." [87]

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. *Haynes* v. *Washington*, 373 U. S.

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[87] One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

503, 512–513 (1963); *Haley* v. *Ohio*, 332 U. S. 596, 601 (1948) (opinion of MR. JUSTICE DOUGLAS).

No. 760. *Vignera* v. *New York*.

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3:00 p. m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, "for detention." At 11:00 p. m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

> "The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what

I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment.[68] The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 A. D. 2d 752, 252 N. Y. S. 2d 19, and by the Court of Appeals, also without opinion, 15 N. Y. 2d 970, 207 N. E. 2d 527, 259 N. Y. S. 2d 857, remittitur amended, 16 N. Y. 2d 614, 209 N. E. 2d 110, 261 N. Y. S. 2d 65. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. *Westover* v. *United States.*

At approximately 9:45 p. m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p. m. he was booked. Kansas City police interrogated West-

[68] Vignera thereafter successfully attacked the validity of one of the prior convictions, *Vignera* v. *Wilkins,* Civ. 9901 (D. C. W. D. N. Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31–33.

over on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F. 2d 684.

We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.[89] At the

[89] The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the

time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced their interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from West-

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objection available, the failure to object at trial does not constitute a waiver of the claim. See, *e. g.*, *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12, 16 (C. A. 2d Cir. 1964), aff'd, 381 U. S. 654 (1965). Cf. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78 (1943).

over the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. *California* v. *Stewart.*

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, repondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p. m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the five robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances,

however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal. 2d 571, 400 P. 2d 97, 43 Cal. Rptr. 201. It held that under this Court's decision in *Escobedo*, Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights.[70]

We affirm.[71] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been em-

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[70] Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by *Jackson* v. *Denno*, 378 U. S. 368 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33, 36 Cal. Rptr. 201 (1964).

[71] After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U. S. C. § 1257 (3) (1964 ed.), we denied the motion. 383 U. S. 903.

ployed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

759	Ernesto A. Miranda, Petitioner, *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
760	Michael Vignera, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
761	Carl Calvin Westover, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
584	State of California, Petitioner, *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE CLARK, dissenting in Nos. 759, 760, and 761, and concurring in result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I agree with the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" [1] are, as I read them, merely writings in this field by pro-

[1] *E. g.*, Inbau and Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Interrogation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

fessors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports.[2] The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

I.

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. —. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, that counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of

[2] As developed by my Brother HARLAN, *post*, pp. —, —, such cases, with the exception of the long-discredited decision in *Bram* v. *United States*, 168 U. S. 532 (1897), were adequately treated in terms of due process.

any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.[3] Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements, truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforce-

[3] The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother HARLAN points out, *post*, pp. —, —, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. —, —, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover* v. *United States*, 342 F. 2d 684, 685 (1965) ("right to consult counsel"); *Jackson* v. *United States*, 337 F. 2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult counsel before making a statement, the interview is terminated at that point . . . . When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: "[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge." So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial—but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

ment." *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding and where the light of our past cases, from *Hopt* v. *Utah*, 110 U. S. 574, (1884), down to *Haynes* v. *Washington*, *supra*, are to the contrary. Indeed, even in *Escobedo* the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker* v. *California*, 357 U. S. 433 (1958) and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in *Escobedo*, stated it in *Haynes* v. *Washington*—depended upon "a totality of circumstances evidencing an involuntary . . . admission of guilt." 373 U. S., at 514. And he concluded:

> "Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such

as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducement on the mind and will of an accused . . . . We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded." *Id.*, at 515.

III.

I would continue to follow that rule. Under the "totality of circumstances" rule of which my Brother Goldberg spoke in *Haynes*, I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary.

Rather than employing the arbitrary Fifth Amendment rule[4] which the Court lays down I would follow the more pliable dictates of Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody. In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. It will be soon enough to go further when we are able to

[4] In my view there is "no significant support" in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point see the dissenting opinion of my Brother WHITE, *post*, pp. —, —.

appraise with somewhat better accuracy the effect of such a holding.

I would affirm the convictions in *Miranda* v. *Arizona*, No. 759; *Vignera* v. *New York*, No. 760; and *Westover* v. *United States*, No. 761. In each of those cases I find from the circumstances no warrant for reversal. In *California* v. *Stewart*, No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U. S. C. § 1257 (3) (1964); but if the merits are to be reached I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances showing voluntariness. Should there be a retrial, I would leave the State free to attempt to prove these elements.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
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State of California, Petitioner, 584 *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

I. INTRODUCTION.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a four-

fold warning be given to a person in custody before he is questioned: namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.[1]

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may

[1] My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable if not one-sided appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

II. Constitutional Premises.

It is most fitting to begin an inquiry into the constitutional precedents by surveying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt* v. *Utah*, 110 U. S. 574; *Pierce* v. *United States*, 160 U. S. 355. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions.[2] The

[2] The case was *Bram* v. *United States*, 168 U. S. 532 (quoted, *ante*, p. 23). Its historical premises were afterwards disproved by

Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," *Wan* v. *United States*, 266 U. S. 1, 14 (quoted, *ante*, p. 24), and then by and large left federal judges to apply the same standards the Court began to derive in a string of state court cases.

This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with *Brown* v. *Mississippi*, 297 U. S. 278, and must now embrace somewhat more than 30 full opinions of the Court.[2] While the voluntariness rubric was repeated in many instances, *e. g.*, *Lyons* v. *Oklahoma*, 322 U. S. 596, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, *e. g.*, *Ward* v. *Texas*, 316 U. S. 547, supplemented by concern over the legality and fairness of the police practices, *e. g.*, *Ashcraft* v. *Tennessee*, 322 U. S. 143, in an "accusatorial" system of law enforcement, *Watts* v. *Indiana*, 338 U. S. 49, 54, and eventually by close attention to the individual's state of mind and capacity for effective choice, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49. The outcome was a continuing re-evaluation

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Wigmore, who concluded "that no assertions could be more unfounded." 3 Wigmore, Evidence § 823, at 250, n. 5 (3d ed. 1940). The Court in *United States* v. *Carignan*, 342 U. S. 36, 41, declined to choose between *Bram* and Wigmore, and *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, cast further doubt on *Bram*. There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. *Burdeau* v. *McDowell*, 256 U. S. 465, 475; see *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 347. On *Bram* and the federal confession cases generally, see Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 959–961 (1966).

[2] Comment, 31 U. Chi. L. Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced confession cases had been decided by this Court, apart from *per curiams*. *Spano* v. *New York*, 360 U. S. 315, 321, n. 2, collects 28 cases.

on the facts of each case of *how much* pressure on the suspect was permissible.[4]

Among the criteria often taken into account were threats or imminent danger, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560, physical deprivations such as lack of sleep or food, *e. g.*, *Reck* v. *Pate*, 367 U. S. 433, repeated or extended interrogation, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227, limits on access to counsel or friends, *Crooker* v. *California*, 357 U. S. 433; *Cicenia* v. *Lagay*, 357 U. S. 504, length and illegality of detention under state law, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, and individual weakness or incapacities, *Lynumn* v. *Illinois*, 372 U. S. 528. Apart from direct physical coercion, however, no single default or fixed combination of them guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in *Escobedo* v. *Illinois*, 378 U. S. 478, it is worth capsulizing the then-recent case of *Haynes* v. *Washington*, 373 U. S. 573. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and reject-

[4] Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col. L. Rev. 62, 73 (1966): "In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 452–458 (1964); Developments, *supra*, n. 2, at 964–984.

ing some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see *Culombe* v. *Connecticut*, 367 U. S. 568, 635 (concurring opinion of THE CHIEF JUSTICE), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts. Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,[5] and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers* v. *United States*, 223 U. S. 303; *Wilson* v. *United States*, 162 U. S. 613. As recently as *Haynes* v. *Washington*, 373 U. S. 503, 515, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, *Crooker* v. *California*, 357 U. S. 433, 441.

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[5] See the cases synopsized in Herman, *supra*, n. 4, at 456, nn. 36–39. One not too distant example is *Stroble* v. *California*, 343 U. S. 181, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy* v. *Hogan*, 378 U. S. 1, 8, and that "a prisoner is not 'to be made the deluded instrument of his own conviction,'" *Culombe* v. *Connecticut*, 367 U. S. 568, 581 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed somewhat misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, *e. g.*, *supra*, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in all events one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil*. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the

two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents . . . ." 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.[6] Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself." Cf. Kamisar, Equal Justice in The Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 25–26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for as the Court reiterates the privilege embodies basic principles always capable of expansion.[7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general

[6] Among the examples given in 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified—as by the English Bankruptcy Act—the confession rule may still operate.

[7] Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt § 2.03, at 15–16 (1959).

principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.[8] It then emerges from a discussion of *Escobedo* that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See *ante*, pp. 27–28. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.[9]

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial

[8] This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates an examination of the scope of the privilege in state cases as well." *Ante*, p. 25. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U. S., at 7.

[9] I lay aside *Escobedo* itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of *Escobedo*'s primary reliance on the Sixth Amendment.

of removal of one's case from state to federal court, *Maryland* v. *Soper*, 270 U. S. 9; in refusal of a military commission, *Orloff* v. *Willoughby*, 345 U. S. 83; in denial of a discharge in bankruptcy, *Kaufman* v. *Hurwitz*, 176 F. 2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 440–444, n. 17 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, *e. g.*, *Griffin* v. *California*, 380 U. S. 609. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, *e. g.*, *United States* v. *Scully*, 225 F. 2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev. 1961). Cf. *Henry* v. *Mississippi*, 379 U. S. 443, 451–452 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See *infra*, pp. 13–15.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a

knowing and intelligent waiver, the Court cites to *Johnson* v. *Zerbst*, 304 U. S. 458, *ante*, p. 37; appointment of counsel for the indigent suspect is tied to *Gideon* v. *Wainwright*, 372 U. S. 335, and *Douglas* v. *California*, 372 U. S. 353, *ante*, p. 35; the silent-record doctrine is borrowed from *Carnley* v. *Cochran*, 369 U. S. 506, *ante*, p. 37, as is the right to an express offer of counsel, *ante*, p. 33. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.[10]

The only attempt in this Court to carry the right to counsel into the station house occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than trial itself. See 378 U. S., 485–488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical" yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer

[10] Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police-interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 943–948 (1965).

in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding. See *infra*, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Friendly, *supra*, n. 10, at 950.

III. Policy Considerations.

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law. Forgoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. *Ante*, p. 41. Rather, precedent reveals that the Fourteenth Amendment in practice has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the sus-

pect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced" is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." *Ashcraft* v. *Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out *undue* pressure, not to assure spontaneous confessions.[11]

The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.[12] In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. *Ante*, pp. 10–18.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite

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[11] See *supra*, n. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See *Collins* v. *Beto*, 348 F. 2d 823, 832 (concurring opinion); Bator & Vorenberg, *supra*, n. 4, at 72–73.

[12] The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" (*ante*, p. 32) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts* v. *Indiana*, 338 U. S. 49, 59 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." See Enker & Elsen, Counsel for the Suspect, 49 Minn. L. Rev. 47, 66–68 (1964).

reasonably been thought worth the price paid for it.[13] There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. See, *supra*, n. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, see Developments, *supra*, n. 2, at 941–944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. See *infra*, n. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control,[14] and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit

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[13] This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and beleaguered by the new heirs. *Ante*, pp. 19–20, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.

[14] See, *e. g.*, the voluminous citations to congressional committee testimony and other sources collected in *Culombe* v. *Connecticut*, 367 U. S. 568, 578–579 (Frankfurter, J., announcing the Court's judgment and an opinion).

stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

This brief statement of the competing considerations seems to me ample proof that the Court's preference is highly debatable at best and therefore not to be read into the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda* v. *Arizona* serves best, being neither the hardest nor easiest of the four under the Court's standards.[18]

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him,

[18] In *Westover*, a seasoned criminal was practically given the Court's full complement of warnings and did not heed them. The *Stewart* case, on the other hand, involves long detention and successive questioning. In *Vignera*, the facts are complicated and the record somewhat incomplete.

starting about 11:30 a. m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and—I will assume this though the record is uncertain, *ante*, 53–54 & nn. 66–67—without any effective warnings at all.

Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.[16]

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although *Escobedo* has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions

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[16] "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (Cardozo, J.).

in point have sought quite narrow interpretations.[17] Of the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today.[18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson* v. *Zerbst*, 304 U. S. 458, *Mapp* v. *Ohio*, 367 U. S. 643, and *Gideon* v. *Wainwright*, 372 U. S. 335. In *Johnson*, which established that appointed counsel

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[17] A narrow reading is given in: *United States* v. *Robinson*, 354 F. 2d 109 (C. A. 2d Cir.); *Davis* v. *North Carolina*, 339 F. 2d 770 (C. A. 4th Cir.); *Edwards* v. *Holman*, 342 F. 2d 679 (C. A. 5th Cir.); *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (C. A. 7th Cir.); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa); *Rowe* v. *Commonwealth*, 394 S. W. 2d 751 (Ky.); *Parker* v. *Warden*, 203 A. 2d 418 (Md.); *State* v. *Howard*, 383 S. W. 2d 701 (Mo.); *Bean* v. *State*, 398 P. 2d 251 (Nev.); *Hodgson* v. *New Jersey*, 44 N. J. 151, — A. 2d —; *People* v. *Gunner*, 15 N. Y. 2d 226, 205 N. E. 2d 852; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169.

An ample reading is given in: *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (C. A. 3d Cir.); *Wright* v. *Dickson*, 336 F. 2d 878 (C. A. 9th Cir.); *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361; *State* v. *Dufour*, 206 A. 2d 82 (R. I.); *State* v. *Neely*, 229 Ore. 487, 395 P. 2d 557, modified, 398 P. 2d 482.

The cases in both categories are those readily available; there are certainly many others.

[18] For instance, compare the requirements of the catalytic case of *People* v. *Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, p. 26 (1966 Cardozo Lecture, N. Y. City Bar Ass'n, multilith copy).

must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beany, Right to Counsel 29–30, 36–42 (1955). In *Mapp*, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U. S., at 651. In *Gideon*, which extended *Johnson* v. *Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States beside the respondent came forward to protest. See 372 U. S., at 345. By contrast, in this case new restrictions on police questioning have been opposed by the United States and in an *amicus* brief signed by 27 States and Commonwealths, not including the three other States who are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief résumé will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy,[19] but in all events the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative "waiver" before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind.

[19] The Court's *obiter dictum* notwithstanding, *ante*, p. 48, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See *ante*, pp. 46–48. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, *supra*, n. 2, at 1084–1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data is considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify.[20]

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments,

[20] For citations and discussion covering each of these points, see Developments, *supra*, n. 2, at 1091–1097, and Enker & Elsen, *supra*, n. 12, at 80 & n. 94.

supra, n. 2, at 1106–1110; *Reg.* v. *Ramasamy* [1965] A. C. 1 (P. C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country.[21] The Court ends its survey by imputing added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive reexamination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professor Vorenberg of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.[22] Studies are also being conducted by the

[21] On comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U. Pa. L. Rev. 165, 181 and nn. 96–97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, *id.*, at 167–169; guilt based on majority jury verdicts, *id.*, at 185; and pre-trial discovery of evidence on both sides, *id.*, at 175.

[22] Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research.[23] There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.[24]

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.[25] But the legislative reforms when they came would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV. Conclusions.

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely

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[23] See Brief for the United States in *Westover*, p. 45. The N. Y. Times, June 3, 1966, p. 33 (city ed.) reported that the Ford Foundation has awarded $1,100,000 for a five-year study of arrests and confessions in New York.

[24] The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. N. Y. Times, May 24, 1966, p. 35 (late city ed.).

[25] The Court waited 12 years after *Wolf* v. *Colorado*, 338 U. S. 25, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in *Mapp* v. *Ohio*, 367 U. S. 643, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, *Miranda* v. *Arizona* (No. 759) and *Vignera* v. *New York* (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners. I would affirm in these two cases. The other state case is *California* v. *Stewart* (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U. S. C. § 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in *Stewart* be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, *Westover* v. *United States* (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the *McNabb-Mallory* rule into play under *Anderson* v. *United States*, 318 U. S. 350. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in petitioner's arrest and detention by the State too slight to invoke *Anderson*. I agree with the

Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court takes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (separate opinion): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
Carl Calvin Westover, Petitioner, 761 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later, "[b]ut there is nothing in the

reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates." Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when "[c]onsidered in the light to be shed by grammar and the dictionary . . . appear to signify simply that nobody shall be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant." Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 2. And there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provision any broader meaning. Mayers, The Federal Witness' Privilege Against Self Incrimination: Constitutional or Common-Law? 4 American Journal of Legal History 107 (1960). Such a construction, however, was considerably narrower than the privilege at common law, and when eventually faced with the issues, the Court extended the constitutional privilege to the compulsory production of books and papers, to the ordinary witness before the grand jury and to witnesses generally. *Boyd* v. *United States*, 116 U. S. 616, and *Counselman* v. *Hitchcock*, 142 U. S. 547. Both rules had solid support in common-law history, if not in the history of our own constitutional provision.

A few years later the Fifth Amendment privilege was similarly extended to encompass the then well-established rule against coerced confessions: "In criminal trials, in

the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " *Bram* v. *United States*, 168 U. S. 532, 542. Although this view has found approval in other cases, *Burdeau* v. *McDowell*, 256 U. S. 465, 475; *Powers* v. *United States*, 223 U. S. 303, 313; *Shotwell* v. *United States*, 371 U. S. 341, 347, it has also been questioned, see *Brown* v. *Mississippi*, 297 U. S. 278, 285; *United States* v. *Carignan*, 342 U. S. 36, 41; *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, and finds scant support in either the English or American authorities, see generally *Regina* v. *Scott*, I Dears. & Bell 47; III Wigmore, Evidence § 823, at 249 ("a confession is not rejected because of any connection with the *privilege against self-crimination*"), 250, n. 5 (particularly criticizing *Bram*) (3d ed. 1940), VIII Wigmore, Evidence §2266, at 400–401 (McNaughton ed. 1961). Whatever the source of the rule excluding coerced confessions, it is clear that prior to the application of the privilege itself to state courts, *Malloy* v. *Hogan*, 378 U. S. 1, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. *Id.*, at 6–7, 10.

Bram, however, itself rejected the proposition which the Court now espouses. The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable, the Court's inquiry could have ended there. After examining the English and American authorities, however, the Court declared that:

> "In this Court also it has been settled that the mere fact that the confession is made to a police officer,

> while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not statements of the prisoner were voluntary." 168 U. S., at 558.

In this respect the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus prior to *Bram* the Court, in *Hopt* v. *Utah*, 110 U. S. 574, 583–587, had upheld the admissibility of a confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt*, the Court ruled squarely on the issue in *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55:

> "Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. Wharton's Cr. Ev. 9th ed. §§ 661, 663, and authorities cited."

Accord, *Pierce* v. *United States*, 160 U. S. 355, 357.

And in *Wilson* v. *United States*, 162 U. S. 613, 623, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness. "The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. . . . And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned."

Since *Bram*, the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers* v. *United States*, 223 U. S. 303, cited *Wilson* approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible," *McNabb* v. *United States*, 318 U. S. 332, 346; accord, *United States* v. *Mitchell*, 322 U. S. 65, despite its having been elicited by police examination, *Wan* v. *United States*, 266 U. S. 1, 14; *United States* v. *Carrignan*, 342 U. S. 36, 39. Likewise, in *Crooker* v. *California*, 357 U. S. 433, the Court said that "the mere fact of police detention and police examination in private of one in official state custody does not render involuntary a confession by one so detained." And finally, in

Cicenia v. *Lagay*, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally *Culombe* v. *Connecticut*, 367 U. S. 568, 587–602 (opinion of Frankfurter, J.); III Wigmore, Evidence § 851, at 313 (3d ed. 1940); see also Joy, Confessions 38, 46 (1842).

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

II.

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.[1] This is what the Court historically has done. Indeed, it is what it must do and will continue

[1] Of course the Court does not deny that it is departing from prior precedent; it expressly overrules *Crooker* and *Cicenia*, *ante*, at 41, n. 47, and it acknowledges that "[i]n these cases . . . we might not find the statements to have been involuntary in traditional terms," *ante*, at 19.

to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

III.

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if *compelled*. Hence the core of the Court's opinion is that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice," *ante*, at 20, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years experience. Nor does it assert that its novel

conclusion reflects a changing consensus among state courts, see *Mapp* v. *Ohio*, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see *Gideon* v. *Wainwright*, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.[2] Insofar as it appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

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[2] In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11, 41–45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, Model Pre-Arraignment Procedure Code, Commentary § 5.01, at 170, n. 4 (Tent. Draft No. 1, 1966).

Although in the Court's view in-custody interrogation is inherently coercive, it says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as "Do you have anything to say?" or "Did you kill your wife?" his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See *Ashcraft* v. *Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California*, 314 U. S. 219, 241, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes* v. *Washington*, 373 U. S. 503, 513; *Lynumn* v. *Illinois*, 372 U. S. 528, 534. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, *e. g.*, *Ashcraft* v. *Tennessee*,

322 U. S. 143; *Haynes* v. *Washington*, 373 U. S. 503.[1] But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare *Tot* v. *United States*, 319 U. S. 463, 466; *United States* v. *Romano*, 382 U. S. 136. *A fortiori* that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See *Wilson* v. *United States*, 162 U. S. 613, 624. Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the

[1] By contrast, the Court indicates that in applying this new rule it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Ante*, at 31. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See *United States* v. *Bolden*, 355 F. 2d 453 (C. A. 7th Cir. 1965), petition for cert. pending No. 1146 O. T. 1965 (secret service agent); *People* v. *DuBond*, 235 Cal. App. 2d 844, 45 Cal. Rptr. 717, pet. for cert. pending No. 1053 Misc. O. T. 1965 (former police officer).

confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by the Court would still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears. But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney. It expects, however, that not too many will waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself.

It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "right to counsel to protect the Fifth Amendment privilege . . . ." *Ante*, at 32. The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

IV.

Criticism of the Court's opinion, however, cannot stop at a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by

its own independent labors. *Ante*, at 22. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, with the police asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or with confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo* v. *Illinois*, 378 U. S. 478, 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown* v. *Walker*, 161 U. S. 591, 596; see also *Hopt* v. *Utah*, 110 U. S. 574, 584–585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious

to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutory rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and of his property. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 455. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this county [4] and of the number of instances

[4] Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Re-

in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

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ports. Of 192,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports—1964, 27–28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25–27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J. of Crim. L., C. & P. S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted. That the criminal law is wholly or partly ineffective with a segment of the population or with many of those who have been apprehended and convicted is a very faulty basis for concluding that it is not effective with respect to the great bulk of our citizens or for thinking that without the criminal laws, or in the absence of their enforcement, there would be no increase in crime. Arguments of this nature are not borne out by any kind of reliable evidence that I have seen to this date.

Thirdly, the law concerns itself with those whom it has confined. The hope and aim of modern penalogy, fortunately, is as soon as possible to return the convict to society a better and more law-abiding man than when he entered. Sometimes there is success, sometimes failure. But at least the effort is made, and it should be made to the very maximum extent of our present and future capabilities.

The rule announced today will measurably weaken the ability of the criminal law to perform in these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials.[5] Criminal trials, no

[5] Eighty-eight federal district courts (excluding the District Court for the District of Columbia) disposed of the cases of 33,381 criminal defendants in 1964. Only 12.5% of those cases were actually tried. Of the remaining cases, 89.9% were terminated by convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, *supra*, note 4, 3–6. In the District Court for the District of Columbia a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. *Id.*, at 58–59. No reliable statistics are available concerning the percentage of cases in which

matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See Federal Offenders: 1964, *supra*, note 4, at 6 (Table 4), 59 (Table 1); Federal Offenders: 1963, *supra*, note 4, at 5 (Table 3); District of Columbia Offenders: 1963, *supra*, note 4, at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants, who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence, will now, under this new version of the Fifth Amendment, either not be tried at all or acquitted if the State's evidence, minus the confession, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to

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guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

Perhaps of equal significance is the number of instances of known crimes which are not solved. In 1964, only 388,946, or 23.9% of 1,626,574 serious known offenses were cleared. The clearance rate ranged from 89.8% for homicides to 18.7% for larceny. FBI, Uniform Crime Reports—1964, 20-22, 101. Those who would replace interrogation as an investigatorial tool by modern scientific investigation techniques significantly overestimate the effectiveness of present procedures, even when interrogation is included.

repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Nor can this decision do other than have a corrosive effect on the criminal law as an effective device to prevent crime. A major component in its effectiveness in this regard is its swift and sure enforcement. The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it. This is still good common sense. If it were not, we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct.

And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of his next victim.

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all and may be able to extricate himself quickly and

simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest several suspects, as where the body of the victim is discovered in a house having several residents, see *Johnson* v. *State*, 238 Md. 140, 207 A. 2d 648 (1965), pet. for cert. pending No. 274 Misc. O. T. 1965, it will often be true that a suspect may be cleared only through the results of interrogation of other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnaping, see *Brinegar* v. *United States*, 338 U. S. 160, 183 (Jackson, J., dissenting); *People* v. *Modesto*, 398 P. 2d 753, 759, 42 Cal. Rptr. 417, 423 (1965), those involving the national security, see *Drummond* v. *United States*, 354 F. 2d 132, 147 (C. A. 2d Cir. 1965)) (*en banc*) (espionage case), pet. for cert. pending No. 1203 Misc. O. T. 1965; cf. *Gessner* v. *United States*, 354 F. 2d 726, 730, n. 10 (C. A. 10th Cir. 1965) (upholding, in espionage case, trial ruling that Government need not submit classified portions of interrogation transcript), and some organized crime situations. In the latter context the lawyer who arrives may also be the lawyer for the defendants' colleagues and can be relied upon to insure that no breach of the organization's security takes place even though

the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's *per se* approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration, will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761 and reverse in No. 584.